

fective with respect to all contracts entered into at any time after the date of enactment [July 6, 1973].”

### § 358. Wage and fringe benefit determinations of Secretary

It is the intent of the Congress that determinations of minimum monetary wages and fringe benefits for the various classes of service employees under the provisions of paragraphs (1) and (2) of section 351<sup>1</sup> of this title should be made with respect to all contracts subject to this chapter, as soon as it is administratively feasible to do so. In any event, the Secretary shall make such determinations with respect to at least the following contracts subject to this chapter which are entered into during the applicable fiscal year:

(1) For the fiscal year ending June 30, 1973, all contracts under which more than twenty-five service employees are to be employed.

(2) For the fiscal year ending June 30, 1974, all contracts, under which more than twenty service employees are to be employed.

(3) For the fiscal year ending June 30, 1975, all contracts under which more than fifteen service employees are to be employed.

(4) For the fiscal year ending June 30, 1976, all contracts under which more than ten service employees are to be employed.

(5) On or after July 1, 1976, all contracts under which more than five service employees are to be employed.

(Pub. L. 89-286, §10, as added Pub. L. 92-473, §5, Oct. 9, 1972, 86 Stat. 790; amended Pub. L. 94-273, §29, Apr. 21, 1976, 90 Stat. 380.)

#### AMENDMENTS

1976—Par. (5). Pub. L. 94-273 substituted “On or after July 1, 1976” for “For the fiscal year ending June 30, 1977, and for each fiscal year thereafter”.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 353 of this title.

### CHAPTER 7—OFFICE OF FEDERAL PROCUREMENT POLICY

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<sup>1</sup> So in original. Probably should be section “351(a)”.

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#### CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in sections 405a, 405b, 601, 607, 705 of this title; title 25 sections 450j, 458cc; title 40 sections 474, 481, 487.

#### § 401. Declaration of policy

It is the policy of the United States Government to promote economy, efficiency and effectiveness in the procurement of property and services by the executive branch of the Federal Government by—

- (1) promoting full and open competition;
- (2) establishing policies, procedures, and practices which will provide the Government with property and services of the requisite quality, within the time needed, at the lowest reasonable cost;
- (3) promoting the development of simplified uniform procurement processes;
- (4) promoting the participation of small business concerns;
- (5) supporting the continuing development of a competent, professional work force;
- (6) eliminating fraud and waste in the procurement process;
- (7) eliminating redundant administrative requirements placed on contractor and Federal procurement officials;
- (8) promoting fair dealings and equitable relationships with the private sector;
- (9) ensuring that payment is made in a timely manner and only for value received;
- (10) requiring, to the extent practicable, the use of commercial products to meet the Government's needs;
- (11) requiring that personal services are obtained in accordance with applicable personnel procedures and not by contract;
- (12) ensuring the development of procurement policies that will accommodate emergencies and wartime as well as peacetime requirements;
- (13) promoting, whenever feasible, the use of specifications which describe needs in terms of

functions to be performed or the performance required; and

(14) establishing policies and procedures that encourage the consideration of the offerors' past performance in the selection of contractors.

(Pub. L. 93-400, § 2, Aug. 30, 1974, 88 Stat. 796; Pub. L. 96-83, § 2, Oct. 10, 1979, 93 Stat. 648; Pub. L. 98-191, § 3, Dec. 1, 1983, 97 Stat. 1325; Pub. L. 100-679, § 2(a), Nov. 17, 1988, 102 Stat. 4055; Pub. L. 103-355, title I, § 1091(a), Oct. 13, 1994, 108 Stat. 3272.)

#### AMENDMENTS

1994—Par. (14). Pub. L. 103-355 added par. (14).

1988—Pub. L. 100-679 substituted "the United States Government" for "the Congress".

1983—Pub. L. 98-191 amended section generally, retaining language from former provisions stating congressional policy to promote economy, efficiency, and effectiveness in the procurement of property and services, while emphasizing the use of effective competition, the development of simplified procurement processes and small business participation.

1979—Pub. L. 96-83 added cl. (1), redesignated former cl. (1) as (2) and struck out provisions relating to utilization of competitive procurement methods, redesignated former cl. (2) as (3) and inserted provisions relating to elimination of fraud and waste, and redesignated former cls. (3) to (6) as (4) to (7), (7) to (10) as (9) to (12), and (11) as (8).

#### EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as a note under section 251 of this title.

#### EFFECTIVE DATE OF 1979 AMENDMENT

Section 12 of Pub. L. 96-83 provided that: "Except to the extent otherwise provided therein, the amendments made by this Act [see Short Title of 1979 Amendment note below] shall take effect on October 1, 1979."

#### SHORT TITLE OF 1988 AMENDMENT

Section 1 of Pub. L. 100-679 provided that: "This Act [enacting sections 421 to 424 of this title, amending this section, sections 402, 403, 405, 410, and 420 of this title, sections 5312 to 5315, 8331, 8401, 8701, and 8901 of Title 5, Government Organization and Employees, and section 541 of Title 40, Public Buildings, Property, and Works, repealing section 2168 of Title 50, Appendix, War and National Defense, and enacting provisions set out as notes under sections 405 and 423 of this title and section 5312 of Title 5] may be cited as the 'Office of Federal Procurement Policy Act Amendments of 1988'."

#### SHORT TITLE OF 1983 AMENDMENT

Section 1 of Pub. L. 98-191 provided: "That this Act [enacting sections 413 to 415 of this title, amending this section, sections 5, 6a-1, 252, 403, 405, 407, 409, 410, and 411 of this title, section 831h of Title 16, Conservation, and sections 474, 481, and 487 of Title 40, Public Buildings, Property, and Works] may be cited as the 'Office of Federal Procurement Policy Act Amendments of 1983'."

#### SHORT TITLE OF 1979 AMENDMENT

Section 1(a) of Pub. L. 96-83 provided that: "This Act [amending this section, sections 403, 405, 407, and 409 to 412 of this title, and sections 474, 481, and 487 of Title 40, Public Buildings, Property and Works, and enacting provisions set out as notes under this section and section 405a of this title] may be cited as the 'Office of Federal Procurement Policy Act Amendments of 1979'."

#### SHORT TITLE

Section 1(a) of Pub. L. 93-400, as amended by Pub. L. 103-355, title X, § 10005(a)(1), Oct. 13, 1994, 108 Stat. 3406,

provided that: "This Act [enacting this chapter and amending section 5315 of Title 5, Government Organization and Employees, and sections 474, 481, and 487 of Title 40, Public Buildings, Property, and Works] may be cited as the 'Office of Federal Procurement Policy Act'."

#### STYLISTIC CONSISTENCY

Section 10005(b)(1) of Pub. L. 103-355 provided that: "The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.) is amended so that the section designation and section heading of each section of such Act is in the same form and typeface as the section designation and heading of this section [108 Stat. 3406]."

#### REQUIREMENTS FOR USE OF APPROPRIATIONS BY EXECUTIVE AGENCIES FOR SERVICES BY CONTRACT

Pub. L. 102-394, title V, § 502, Oct. 6, 1992, 106 Stat. 1825, provided that: "No part of any appropriation contained in this Act or subsequent Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Acts shall be expended by an executive agency, as referred to in the Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.), pursuant to any obligation for services by contract, unless such executive agency has awarded and entered into such contract in full compliance with such Act and regulations promulgated thereunder."

Similar provisions were contained in the following prior appropriation acts:

Pub. L. 102-170, title V, § 502, Nov. 26, 1991, 105 Stat. 1140.

Pub. L. 101-517, title V, § 502, Nov. 5, 1990, 104 Stat. 2221.

Pub. L. 101-166, title V, § 502, Nov. 21, 1989, 103 Stat. 1189.

Pub. L. 100-202, § 101(h) [title V, § 502], Dec. 22, 1987, 101 Stat. 1329-256, 1329-287.

Pub. L. 99-500, § 101(i) [H.R. 5233, title V, § 502], Oct. 18, 1986, 100 Stat. 1783-287, and Pub. L. 99-591, § 101(i) [H.R. 5233, title V, § 502], Oct. 30, 1986, 100 Stat. 3341-287.

Pub. L. 99-178, title V, § 502, Dec. 12, 1985, 99 Stat. 1132.

Pub. L. 98-619, title V, § 502, Nov. 8, 1984, 98 Stat. 3332.

Pub. L. 98-139, title V, § 502, Oct. 31, 1983, 97 Stat. 899.

Pub. L. 97-377, title I, § 101(e)(1) [title V, § 502], Dec. 21, 1982, 96 Stat. 1878, 1904.

#### TERMINATION OF WAGE AND PRICE REGULATORY PROGRAM

For provisions relating to the termination of the wage and price regulatory program, see Ex. Ord. No. 12288, Jan. 29, 1981, 46 F.R. 10135, set out as a note under former section 1904 of Title 12, Banks and Banking.

#### EX. ORD. NO. 12073. FEDERAL PROCUREMENT IN LABOR SURPLUS AREAS

Ex. Ord. No. 12073, Aug. 16, 1978, 43 F.R. 36873, provided:

By the authority vested in me as President by the Constitution of the United States of America, and in order to strengthen the economic base of our Nation, it is hereby ordered as follows:

##### 1-1. PROCUREMENTS IN LABOR SURPLUS AREAS

1-101. Executive agencies shall emphasize procurement set-asides in labor surplus areas in order to strengthen our Nation's economy.

1-102. Labor surplus area procurements shall be consistent with this Order and, to the extent funds are available, the priorities of Section 15 of the Small Business Act, as amended by Public Law 95-89 (15 U.S.C. 644).

##### 1-2. ADMINISTRATOR OF GENERAL SERVICES

1-201. The Administrator shall coordinate with and advise State and local officials with regard to Federal efforts to encourage procurements in labor surplus areas with the aim of fostering economic development in labor surplus areas.

1-202. The Administrator shall establish specific labor surplus area procurement targets for Executive agencies in consultation with the heads of those agencies.

1-203. In cooperation with the heads of Executive agencies, the Administrator shall encourage the use of set-asides or other appropriate methods for meeting procurement targets in labor surplus areas.

1-204. The Administrator shall report every six months to the President on the progress of the agencies in achieving the procurement targets.

### 1-3. AGENCY RESPONSIBILITIES

1-301. The Secretary of Labor shall classify and designate labor markets which are labor surplus areas. The Secretary shall provide labor market data to the heads of agencies and State and local officials in order to promote the development of business opportunities in labor surplus areas.

1-302. The heads of Executive agencies shall cooperate with the Administrator in carrying out his responsibilities for labor surplus area programs and shall provide the information necessary for setting procurement targets and recording achievement. They shall keep the Administrator informed of plans and programs which affect labor surplus procurements, with particular attention to opportunities for minority firms.

1-303. In accord with Section 6 of the Office of Federal Procurement Policy Act (41 U.S.C. 405), the Administrator for Federal Procurement Policy shall be responsible for the overall direction and oversight of the policies affecting procurement programs for labor surplus areas.

JIMMY CARTER.

### EXECUTIVE ORDER NO. 12092

Ex. Ord. No. 12092, Nov. 1, 1978, 43 F.R. 51375, as amended by Ex. Ord. No. 12161, Sept. 28, 1979, 44 F.R. 56663, which related to the prohibition against inflationary procurement practices, was revoked by Ex. Ord. No. 12288, Jan. 29, 1981, 46 F.R. 10135.

### EXECUTIVE ORDER NO. 12352

Ex. Ord. No. 12352, Mar. 17, 1982, 47 F.R. 12125, which related to Federal procurement reform to support mission accomplishment more effectively, was revoked by Ex. Ord. No. 12931, § 4, Oct. 13, 1994, 59 F.R. 52388, set out below.

### EXECUTIVE ORDER NO. 12818

Ex. Ord. No. 12818, Oct. 23, 1992, 57 F.R. 48713, which prohibited executive agencies from requiring labor agreements on Federal or federally funded construction projects, was revoked by Ex. Ord. No. 12836, § 1, Feb. 1, 1993, 58 F.R. 7045.

### EX. ORD. NO. 12931. FEDERAL PROCUREMENT REFORM

Ex. Ord. No. 12931, Oct. 13, 1994, 59 F.R. 52387, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to ensure effective and efficient spending of public funds through fundamental reforms in Government procurement, it is hereby ordered as follows:

SECTION 1. To make procurement more effective in support of mission accomplishment and consistent with recommendations of the National Performance Review, heads of executive agencies engaged in the procurement of supplies and services shall:

(a) Review agency procurement rules, reporting requirements, contractual requirements, certification procedures, and other administrative procedures over and above those required by statute, and, where practicable, replace them with guiding principles that encourage and reward innovation;

(b) Review existing and planned agency programs to assure that such programs meet agency mission needs;

(c) Ensure that procurement organizations focus on measurable results and on increased attention to understanding and meeting customer needs;

(d) Increase the use of commercially available items where practicable, place more emphasis on past contractor performance, and promote best value rather than simply low cost in selecting sources for supplies and services;

(e) Ensure that simplified acquisition procedures are used, to the maximum extent practicable, for procurements under the simplified acquisition threshold in order to reduce administrative burdens and more effectively support the accomplishment of agency missions;

(f) Expand the use of the Government purchase card by the agency and take maximum advantage of the micro-purchase authority provided in the Federal Acquisition Streamlining Act of 1994 [Pub. L. 103-355, see Short Title of 1994 Amendment note set out under section 251 of this title] by delegating the authority, to the maximum extent practicable, to the offices that will be using the supplies or services to be purchased;

(g) Establish clear lines of contracting authority and accountability;

(h) Establish career education programs for procurement professionals, including requirements for successful completion of educational requirements or mandatory training for entry level positions and for promotion to higher level positions, in order to ensure a highly qualified procurement work force;

(i) Designate a Procurement Executive with agency-wide responsibility to oversee development of procurement goals, guidelines, and innovation, measure and evaluate procurement office performance against stated goals, enhance career development of the procurement work force, and advise the agency heads whether goals are being achieved; and

(j) Review existing and planned information technology acquisitions and contracts to ensure that the agency receives the best value with regard to price and technology, and consider alternatives in cases where best value is not being obtained.

SEC. 2. The Director of the Office of Personnel Management, in consultation with the heads of executive agencies, shall ensure that personnel policies and classification standards meet the needs of executive agencies for a professional procurement work force.

SEC. 3. The Administrator of the Office of Federal Procurement Policy, after consultation with the Director of the Office of Management and Budget, shall work jointly with the heads of executive agencies to provide broad policy guidance and overall leadership necessary to achieve procurement reform, including, but not limited to:

(a) Coordinating Government-wide efforts;

(b) Assisting executive agencies in streamlining guidance for procurement processes;

(c) Identifying desirable Government-wide procurement system criteria; and

(d) Identifying major inconsistencies in law and policies relating to procurement that impose unnecessary burdens on the private sector and Federal procurement officials, and, following coordination with executive agencies, submitting necessary legislative initiatives to the Office of Management and Budget for the resolution of such inconsistencies.

SEC. 4. Executive Order No. 12352 is revoked.

WILLIAM J. CLINTON.

### STREAMLINING PROCUREMENT THROUGH ELECTRONIC COMMERCE

Memorandum of President of the United States, Oct. 28, 1993, 58 F.R. 58095, provided:

Memorandum for the Heads of Executive Departments and Agencies [and] the President's Management Council

The Federal Government spends \$200 billion annually buying goods and services. Unfortunately, the red tape and burdensome paperwork of the current procurement system increases costs, produces unnecessary delays, and reduces Federal work force productivity. Moving to an electronic commerce system to simplify and streamline the purchasing process will promote customer

service and cost-effectiveness. The electronic exchange of acquisition information between the private sector and the Federal Government also will increase competition by improving access to Federal contracting opportunities for the more than 300,000 vendors currently doing business with the Government, particularly small businesses, as well as many other vendors who find access to bidding opportunities difficult under the current system. For these reasons, I am committed to fundamentally altering and improving the way the Federal Government buys goods and services by ensuring that electronic commerce is implemented for appropriate Federal purchases as quickly as possible.

#### 1. OBJECTIVES.

The objectives of this electronic commerce initiative are to:

(a) exchange procurement information—such as solicitations, offers, contracts, purchase orders, invoices, payments, and other contractual documents—electronically between the private sector and the Federal Government to the maximum extent practical;

(b) provide businesses, including small, small disadvantaged, and women-owned businesses, with greater access to Federal procurement opportunities;

(c) ensure that potential suppliers are provided simplified access to the Federal Government's electronic commerce system;

(d) employ nationally and internationally recognized data formats that serve to broaden and ease the electronic interchange of data; and

(e) use agency and industry systems and networks to enable the Government and potential suppliers to exchange information and access Federal procurement data.

#### 2. IMPLEMENTATION.

The President's Management Council, in coordination with the Office of Federal Procurement Policy of the Office of Management and Budget, and in consultation with appropriate Federal agencies with applicable technical and functional expertise, as necessary, shall provide overall leadership, management oversight, and policy direction to implement electronic commerce in the executive branch through the following actions:

(a) by March 1994, define the architecture for the Government-wide electronic commerce acquisition system and identify executive departments or agencies responsible for developing, implementing, operating, and maintaining the Federal electronic system;

(b) by September 1994, establish an initial electronic commerce capability to enable the Federal Government and private vendors to electronically exchange standardized requests for quotations, quotes, purchase orders, and notice of awards and begin Government-wide implementation;

(c) by July 1995, implement a full scale Federal electronic commerce system that expands initial capabilities to include electronic payments, document interchange, and supporting databases; and

(d) by January 1997, complete Government-wide implementation of electronic commerce for appropriate Federal purchases, to the maximum extent possible.

This implementation schedule should be accelerated where practicable.

The head of each executive department or agency shall:

(a) ensure that budgetary resources are available, within approved budget levels, for electronic commerce implementation in each respective department or agency;

(b) assist the President's Management Council in implementing the electronic commerce system as quickly as possible in accordance with the schedules established herein; and

(c) designate one or more senior level employees to assist the President's Management Council and serve as a point of contact for the development and implementation of the Federal electronic commerce system within each respective department or agency.

#### 3. NO PRIVATE RIGHTS CREATED.

This directive is for the internal management of the executive branch and does not create any right or bene-

fit, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

The Director of the Office of Management and Budget is authorized and directed to publish this memorandum in the Federal Register.

WILLIAM J. CLINTON.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 405, 413, 421 of this title.

#### § 402. Congressional findings and purpose

(a) The Congress finds that economy, efficiency, and effectiveness in the procurement of property and services by the executive agencies will be improved by establishing an office to exercise responsibility for Government-wide procurement policies, regulations, procedures, and forms.

(b) The purpose of this chapter is to establish an Office of Federal Procurement Policy in the Office of Management and Budget to provide overall direction of procurement policies, regulations, procedures, and forms for executive agencies in accordance with applicable laws.

(Pub. L. 93-400, §3, Aug. 30, 1974, 88 Stat. 796; Pub. L. 100-679, §2(b), Nov. 17, 1988, 102 Stat. 4055.)

#### REFERENCES IN TEXT

This chapter, referred to in subsec. (b), was in the original "this Act", meaning Pub. L. 93-400, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 401 of this title and Tables.

#### AMENDMENTS

1988—Subsec. (a). Pub. L. 100-679 inserted "Government-wide" before "procurement policies".

#### § 403. Definitions

As used in this chapter:

(1) The term "executive agency" means—

(A) an executive department specified in section 101 of title 5;

(B) a military department specified in section 102 of such title;

(C) an independent establishment as defined in section 104(1) of such title; and

(D) a wholly owned Government corporation fully subject to the provisions of chapter 91 of title 31.

(2) The term "procurement" includes all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout.

(3) The term "procurement system" means the integration of the procurement process, the professional development of procurement personnel, and the management structure for carrying out the procurement function.

(4) The term "standards" means the criteria for determining the effectiveness of the procurement system by measuring the performance of the various elements of such system.

(5) The term "competitive procedures" means procedures under which an agency enters into a contract pursuant to full and open competition.

(6) The term “full and open competition”, when used with respect to a procurement, means that all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement.

(7) The term “responsible source” means a prospective contractor who—

(A) has adequate financial resources to perform the contract or the ability to obtain such resources;

(B) is able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and Government business commitments;

(C) has a satisfactory performance record;

(D) has a satisfactory record of integrity and business ethics;

(E) has the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain such organization, experience, controls, and skills;

(F) has the necessary production, construction, and technical equipment and facilities, or the ability to obtain such equipment and facilities; and

(G) is otherwise qualified and eligible to receive an award under applicable laws and regulations.

(8) The term “technical data” means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer software documentation) relating to supplies procured by an agency. Such term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration.

(9)(A) The term “major system” means a combination of elements that will function together to produce the capabilities required to fulfill a mission need, which elements may include hardware, equipment, software or any combination thereof, but excludes construction or other improvements to real property; and

(B) a system shall be considered a major system if (i) the Department of Defense is responsible for the system and the total expenditures for research, development, test and evaluation for the system are estimated to be more than \$75,000,000 (based on fiscal year 1980 constant dollars) or the eventual total expenditure for procurement of more than \$300,000,000 (based on fiscal year 1980 constant dollars); (ii) a civilian agency is responsible for the system and total expenditures for the system are estimated to exceed \$750,000 (based on fiscal year 1980 constant dollars) or the dollar threshold for a “major system” established by the agency pursuant to Office of Management and Budget (OMB) Circular A-109, entitled “Major Systems Acquisitions”, whichever is greater; or (iii) the system is designated a “major system” by the head of the agency responsible for the system.

(10) The term “item”, “item of supply”, or “supplies” means any individual part, component, subassembly, assembly, or subsystem in-

tegral to a major system, and other property which may be replaced during the service life of the system, and includes spare parts and replenishment spare parts, but does not include packaging or labeling associated with shipment or identification of an “item”.

(11) The term “simplified acquisition threshold” means \$100,000.

(12) The term “commercial item” means any of the following:

(A) Any item, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes, and that—

(i) has been sold, leased, or licensed to the general public; or

(ii) has been offered for sale, lease, or license to the general public.

(B) Any item that evolved from an item described in subparagraph (A) through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Federal Government solicitation.

(C) Any item that, but for—

(i) modifications of a type customarily available in the commercial marketplace, or

(ii) minor modifications made to meet Federal Government requirements,

would satisfy the criteria in subparagraph (A) or (B).

(D) Any combination of items meeting the requirements of subparagraph (A), (B), (C), or (E) that are of a type customarily combined and sold in combination to the general public.

(E) Installation services, maintenance services, repair services, training services, and other services if such services are procured for support of an item referred to in subparagraph (A), (B), (C), or (D) and if the source of such services—

(i) offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions; and

(ii) offers to use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public.

(F) Services offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog prices for specific tasks performed and under standard commercial terms and conditions.

(G) Any item, combination of items, or service referred to in subparagraphs (A) through (F) notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.

(H) A nondevelopmental item, if the procuring agency determines, in accordance with conditions set forth in the Federal Ac-

quisition Regulation, that the item was developed exclusively at private expense and has been sold in substantial quantities, on a competitive basis, to multiple State and local governments.

(13) The term “nondevelopmental item” means any of the following:

(A) Any commercial item.

(B) Any previously developed item of supply that is in use by a department or agency of the United States, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement.

(C) Any item of supply described in subparagraph (A) or (B) that requires only minor modification or modification of the type customarily available in the commercial marketplace in order to meet the requirements of the procuring department or agency.

(D) Any item of supply currently being produced that does not meet the requirements of subparagraph (A), (B), or (C) solely because the item is not yet in use.

(14) The term “component” means any item supplied to the Federal Government as part of an end item or of another component.

(15) The term “commercial component” means any component that is a commercial item.

(Pub. L. 93-400, § 4, Aug. 30, 1974, 88 Stat. 797; Pub. L. 96-83, § 3, Oct. 10, 1979, 93 Stat. 649; Pub. L. 98-191, § 4, Dec. 1, 1983, 97 Stat. 1326; Pub. L. 98-369, div. B, title VII, § 2731, July 18, 1984, 98 Stat. 1195; Pub. L. 98-577, title I, § 102, Oct. 30, 1984, 98 Stat. 3067; Pub. L. 100-679, § 3(c), Nov. 17, 1988, 102 Stat. 4056; Pub. L. 101-510, div. A, title VIII, § 806(a)(1), Nov. 5, 1990, 104 Stat. 1592; Pub. L. 103-355, title IV, § 4001, title VIII, § 8001, Oct. 13, 1994, 108 Stat. 3338, 3384.)

#### CODIFICATION

Section 2731 of Pub. L. 98-369 directed in part that this section be redesignated as section 4 of Pub. L. 93-400 to correct an inconsistency in the language of the amendment by Pub. L. 98-191, which amended this section generally but referred to it as “Sec. 3”. Since this section was enacted as section 4 of Pub. L. 93-400 no change was required.

#### AMENDMENTS

1994—Pub. L. 103-355, § 8001(b)(1), substituted “this chapter:” for “this chapter—” in introductory provisions.

Pars. (1) to (3). Pub. L. 103-355, § 8001(b)(2), (3), substituted “The term” for “the term” and period for semicolon at end.

Par. (4). Pub. L. 103-355, § 8001(b)(2), (4), substituted “The term” for “the term” and period for “; and” at end.

Pars. (5) to (9). Pub. L. 103-355, § 8001(b)(2), (3), substituted “The term” for “the term” and period for semicolon at end.

Par. (10). Pub. L. 103-355, § 8001(b)(2), (4), substituted “The term” for “the term” and period for “; and” at end.

Par. (11). Pub. L. 103-355, § 8001(b)(2), which directed substitution of “The term” for “the term” in par. (11), could not be executed because phrase “the term” did not appear subsequent to amendment by Pub. L. 103-355, § 4001. See below.

Pub. L. 103-355, § 4001, amended par. (11) generally. Prior to amendment, par. (11) read as follows: “the

term ‘small purchase threshold’ means \$25,000, adjusted on October 1 of each year divisible by 5 to the amount equal to \$25,000 in constant fiscal year 1990 dollars (rounded to the nearest \$1,000).”

Pars. (12) to (15). Pub. L. 103-355, § 8001(a), added pars. (12) to (15).

1990—Par. (11). Pub. L. 101-510 added par. (11).

1988—Pars. (4) to (11). Pub. L. 100-679 redesignated pars. (5) to (11) as (4) to (10), respectively, and struck out former par. (4) which defined “single system of Government-wide procurement regulations” for purposes of this chapter.

1984—Pars. (6) to (8). Pub. L. 98-369 added pars. (6) to (8).

Pars. (9) to (11). Pub. L. 98-577 added pars. (9) to (11).

1983—Pub. L. 98-191 amended section generally, restating definitions of “executive agency” and “procurement” and inserting definitions of “procurement system”, “single-system of Government-wide procurement regulations”, and “standards”.

1979—Pub. L. 96-83 designated existing provisions as subsec. (a) and added subsec. (b).

#### EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as a note under section 251 of this title.

#### EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by Pub. L. 96-83 effective Oct. 1, 1979, see section 12 of Pub. L. 96-83, set out as a note under section 401 of this title.

#### MODIFICATION OF FEDERAL ACQUISITION REGULATIONS

Section 2752 of Pub. L. 98-369 provided that: “Not later than March 31, 1985, the single Government-wide procurement regulation referred to in section 4(4)(A) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(4)(A)) shall be modified to conform to the requirements of this title [title VII of Pub. L. 98-369, §§ 2701-2753, July 18, 1984, 98 Stat. 1175-1203] and the amendments made by this title [see Short Title of 1984 Amendment note set out under section 251 of this title].”

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 57, 58, 252a, 254b, 259, 264a, 418a, 701 of this title; title 10 sections 2302, 2302a, 2306a, 2376, 2384, 2393, 2397, 2397b, 2397c, 2402, 2408, 2410, 2410b, 2410i; title 15 sections 632, 637; title 22 section 2679c; title 33 section 1368; title 40 section 334; title 49 section 40118.

### § 404. Establishment of Office of Federal Procurement Policy; appointment of Administrator

(a) There is established in the Office of Management and Budget an office to be known as the Office of Federal Procurement Policy (hereinafter referred to as the “Office”).

(b) There shall be at the head of the Office an Administrator for Federal Procurement Policy (hereinafter referred to as the “Administrator”), who shall be appointed by the President, by and with the advice and consent of the Senate.

(Pub. L. 93-400, § 5, Aug. 30, 1974, 88 Stat. 797.)

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 31 section 506.

### § 405. Authority and functions of the Administrator

#### (a) Development of procurement policy; leadership

The Administrator shall provide overall direction of procurement policy and leadership in the

development of procurement systems of the executive agencies. To the extent that the Administrator considers appropriate, in carrying out the policies and functions set forth in this chapter, and with due regard for applicable laws and the program activities of the executive agencies, the Administrator may prescribe Government-wide procurement policies. These policies shall be implemented in a single Government-wide procurement regulation called the Federal Acquisition Regulation and shall be followed by executive agencies in the procurement of—

- (1) property other than real property in being;
- (2) services, including research and development; and
- (3) construction, alteration, repair, or maintenance of real property.

**(b) Government-wide procurement regulations**

In any instance in which the Administrator determines that the Department of Defense, the National Aeronautics and Space Administration, and the General Services Administration are unable to agree on or fail to issue Government-wide regulations, procedures and forms in a timely manner, including any such regulations, procedures, and forms as are necessary to implement prescribed policy initiated by the Administrator under subsection (a) of this section,<sup>1</sup> the Administrator shall, with due regard for applicable laws and the program activities of the executive agencies and consistent with the policies and functions set forth in this chapter, prescribe Government-wide regulations, procedures and forms which shall be followed by executive agencies in the procurement of—

- (1) property other than real property in being;
- (2) services, including research and development; and
- (3) construction, alteration, repair, or maintenance of real property.

**(c) Noninterference with executive agencies**

The authority of the Administrator under this chapter shall not be construed to—

- (1) impair or interfere with the determination by executive agencies of their need for, or their use of, specific property, services, or construction, including particular specifications therefor; or
- (2) interfere with the determination by executive agencies of specific actions in the award or administration of procurement contracts.

**(d) Enumeration of included functions**

The functions of the Administrator shall include—

- (1) providing leadership and ensuring action by the executive agencies in the establishment, development and maintenance of the single system of simplified Government-wide procurement regulations and resolving differences among the executive agencies in the development of simplified Government-wide procurement regulations, procedures and forms;
- (2) coordinating the development of Government-wide procurement system standards that

shall be implemented by the executive agencies in their procurement systems;

(3) providing leadership and coordination in the formulation of the executive branch position on legislation relating to procurement;

(4)(A) providing for and directing the activities of the computer-based Federal Procurement Data System (including recommending to the Administrator of General Services a sufficient budget for such activities), which shall be located in the General Services Administration, in order to adequately collect, develop, and disseminate procurement data; and

(B) ensuring executive agency compliance with the record requirements of section 417 of this title;

(5) providing for and directing the activities of the Federal Acquisition Institute (including recommending to the Administrator of General Services a sufficient budget for such activities), which shall be located in the General Services Administration, in order to—

(A) foster and promote Government-wide career management programs for a professional procurement work force;

(B) promote and coordinate Government-wide research and studies to improve the procurement process and the laws, policies, methods, regulations, procedures, and forms relating to procurement by the executive agencies; and

(C) establish policies and procedures for the establishment and implementation of education and training programs authorized by this chapter, including the establishment and implementation of training, in conjunction with the General Services Administration, for critical procurement personnel designed to increase the participation of small business concerns owned and controlled by socially and economically disadvantaged individuals, women, and other minorities in procurement activities conducted by an executive agency.<sup>2</sup>

(6) establishing criteria and procedures to ensure the effective and timely solicitation of the viewpoints of interested parties in the development of procurement policies, regulations, procedures, and forms;

(7) developing standard contract forms and contract language in order to reduce the Government's cost of procuring property and services and the private sector's cost of doing business with the Government;

(8) providing for a Government-wide award to recognize and promote vendor excellence;

(9) providing for a Government-wide award to recognize and promote excellence in officers and employees of the Federal Government serving in procurement-related positions;

(10) developing policies, in consultation with the Administrator of the Small Business Administration, that ensure that small businesses, small businesses owned and controlled by socially and economically disadvantaged individuals, and small businesses owned and controlled by women are provided with the

<sup>1</sup> So in original.

<sup>2</sup> So in original. The period probably should be a semicolon.



maximum practicable opportunities to participate in procurements that are conducted for amounts below the simplified acquisition threshold;

(11) developing policies that will promote achievement of goals for participation by small businesses, small businesses owned and controlled by socially and economically disadvantaged individuals, and small business<sup>3</sup> owned and controlled by women; and

(12) completing action, as appropriate, on the recommendations of the Commission on Government Procurement.

**(e) Consultation; assistance of existing executive agencies; advisory committees and inter-agency groups**

In carrying out the functions set forth in subsection (d) of this section, the Administrator—

(1) shall consult with the affected executive agencies, including the Small Business Administration;

(2) may, with the concurrence of the heads of affected executive agencies, designate an executive agency or executive agencies to assist in the performance of such functions; and

(3) may establish advisory committees or other interagency groups to assist in providing for the establishment, development, and maintenance of a single system of simplified Government-wide procurement regulations and to assist in the performance of any of the other functions which the Administrator considers appropriate.

**(f) Oversight of regulations promulgated by other agencies relating to procurement**

The Administrator, with the concurrence of the Director of the Office of Management and Budget, and with consultation with the head of the agency or agencies concerned, may deny the promulgation of or rescind any Government-wide regulation or final rule or regulation of any executive agency relating to procurement if the Administrator determines that such rule or regulation is inconsistent with the policies set forth in section 401 of this title or any policies, regulations, or procedures issued pursuant to subsection (a) of this section.

**(g) Assignment, delegation, or transfer of functions prohibited**

Except as otherwise provided by law, no duties, functions, or responsibilities, other than those expressly assigned by this chapter, shall be assigned, delegated, or transferred to the Administrator.

**(h) Automatic data processing and telecommunications equipment; real property procurement; Office of Management and Budget**

Nothing in this chapter shall be construed to—

(1) impair or affect the authorities or responsibilities conferred by the Federal Property and Administrative Services Act of 1949 [41 U.S.C. 251 et seq.] with respect to the procurement of automatic data processing and telecommunications equipment and services or of real property; or

(2) limit the current authorities and responsibilities of the Director of the Office of Management and Budget.

**(i) Recipients of Federal grants or assistance**

(1) With due regard to applicable laws and the program activities of the executive agencies administering Federal programs of grants or assistance, the Administrator may prescribe Government-wide policies, regulations, procedures, and forms which the Administrator considers appropriate and which shall be followed by such executive agencies in providing for the procurement, to the extent required under such programs, of property or services referred to in clauses (1), (2), and (3) of subsection (a) of this section by recipients of Federal grants or assistance under such programs.

(2) Nothing in paragraph (1) shall be construed to—

(A) permit the Administrator to authorize procurement or supply support, either directly or indirectly, to recipients of Federal grants or assistance; or

(B) authorize any action by such recipients contrary to State and local laws, in the case of programs to provide Federal grants or assistance to States and political subdivisions.

**(j) Policy regarding consideration of contractor past performance**

(1) The Administrator shall prescribe for executive agencies guidance regarding consideration of the past contract performance of offerors in awarding contracts. The guidance shall include—

(A) standards for evaluating past performance with respect to cost (when appropriate), schedule, compliance with technical or functional specifications, and other relevant performance factors that facilitate consistent and fair evaluation by all executive agencies;

(B) policies for the collection and maintenance of information on past contract performance that, to the maximum extent practicable, facilitate automated collection, maintenance, and dissemination of information and provide for ease of collection, maintenance, and dissemination of information by other methods, as necessary;

(C) policies for ensuring that—

(i) offerors are afforded an opportunity to submit relevant information on past contract performance, including performance under contracts entered into by the executive agency concerned, contracts entered into by other departments and agencies of the Federal Government, contracts entered into by agencies of State and local governments, and contracts entered into by commercial customers; and

(ii) such information submitted by offerors is considered; and

(D) the period for which information on past performance of offerors may be maintained and considered.

(2) In the case of an offeror with respect to which there is no information on past contract performance or with respect to which information on past contract performance is not available, the offeror may not be evaluated favorably or unfavorably on the factor of past contract performance.

<sup>3</sup> So in original. Probably should be “businesses”.

**(k) Annual reporting requirement**

The Administrator shall submit to Congress, on an annual basis, an assessment of the progress made in executive agencies in implementing the policy stated in section 263(a) of this title. The Administrator shall use data from existing management systems in making the assessment.

(Pub. L. 93-400, §6, Aug. 30, 1974, 88 Stat. 797; Pub. L. 96-83, §4, Oct. 10, 1979, 93 Stat. 649; Pub. L. 98-191, §5, Dec. 1, 1983, 97 Stat. 1326; Pub. L. 98-369, div. B, title VII, §2732(b)(1), July 18, 1984, 98 Stat. 1199; Pub. L. 100-679, §3(a), Nov. 17, 1988, 102 Stat. 4055; Pub. L. 103-355, title I, §1091(b)(2), title V, §§5051(b), 5091, title VII, §7108, Oct. 13, 1994, 108 Stat. 3272, 3351, 3361, 3378.)

## REFERENCES IN TEXT

The Federal Property and Administrative Services Act of 1949, referred to in subsec. (h)(1), is act June 30, 1949, ch. 288, 63 Stat. 377, as amended. Provisions of the Act relating to contracts are classified generally to subchapter IV (§251 et seq.) of chapter 4 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 471 of Title 40, Public Buildings, Property, and Works, and Tables.

## AMENDMENTS

1994—Subsec. (d)(5)(C). Pub. L. 103-355, §7108(b), added subpar. (C).

Subsec. (d)(8), (9). Pub. L. 103-355, §5091, redesignated par. (8) as (12) and directed adding pars. (8) and (9) at end which was executed by adding pars. (8) and (9) after par. (7) to reflect probable intent of Congress.

Subsec. (d)(10), (11). Pub. L. 103-355, §7108(a), added pars. (10) and (11).

Subsec. (d)(12). Pub. L. 103-355, §5091(2), redesignated par. (8) and (12).

Subsec. (j). Pub. L. 103-355, §1091(b)(2), added subsec. (j).

Subsec. (k). Pub. L. 103-355, §5051(b), added subsec. (k).

1988—Subsec. (a). Pub. L. 100-679, §3(a)(1), substituted “procurement policies. These policies shall be implemented in a single Government-wide procurement regulation called the Federal Acquisition Regulation and shall be” for “procurement policies which shall be implemented in the single system of Government-wide procurement regulations and shall be”.

Subsec. (b). Pub. L. 100-679, §3(a)(2), inserted “, including any such regulations, procedures, and forms as are necessary to implement prescribed policy initiated by the Administrator under subsection (a) of this section,” after “timely manner” and substituted “Administrator shall” for “Administrator may”.

Subsec. (d)(4). Pub. L. 100-679, §3(a)(3), added par. (4) and struck out former par. (4) which read as follows: “providing for a computer-based Federal Procurement Data System which shall be located in the General Services Administration (acting as executive agent for the Administrator) and shall collect, develop, and disseminate procurement data;”.

Subsec. (d)(5). Pub. L. 100-679, §3(a)(3), added par. (5) and struck out former par. (5) which read as follows: “providing for a Federal Acquisition Institute which shall be located in the General Services Administration (acting as executive agent for the Administrator) and shall—

“(A) foster and promote Government-wide career management programs for a professional procurement work force; and

“(B) promote and coordinate Government-wide research and studies to improve the procurement process and the laws, policies, methods, regulations, procedures, and forms relating to procurement by the executive agencies;”.

Subsec. (f). Pub. L. 100-679, §3(a)(4), substituted “The Administrator, with the concurrence of the Director of the Office of Management and Budget, and with consultation with the head of the agency or agencies concerned,” for “The Director of the Office of Management and Budget”.

1984—Subsec. (e). Pub. L. 98-369 substituted “subsection (d)” for “subsection (c)”.

1983—Pub. L. 98-191 amended section generally, revising and restating as subsecs. (a), (c), (d), (e), (g), (h), and (i) provisions of former subsecs. (a), (f), (d), (e), (g), (j), and (b), respectively, and by inserting provisions set out in new subsecs. (b) and (f).

1979—Subsec. (a). Pub. L. 96-83, §4(a), substituted provisions setting forth the responsibilities of the Administrator with respect to the development and implementation of procurement policies, the coordination of programs to improve the quality and performance of personnel, and the development of a uniform procurement system, for provisions setting forth responsibility of the Administrator for overall direction of procurement policy, and functions with respect to issuance of policy, regulations, procedures, and forms.

Subsec. (c). Pub. L. 96-83, §4(b), substituted provisions relating to development and proposal of a central management system, for provisions setting forth limitation of authority to procurement from appropriated funds and provisions relating to a study and report of procurement from nonappropriated funds.

Subsec. (d). Pub. L. 96-83, §4(c), substituted provisions setting forth the review, development, etc., functions of the Administrator with respect to procurement policies, regulations, procedures, and forms, procurement data, procurement personnel, and procurement contracts, for provisions setting forth the establishment, monitoring, etc., functions of the Administrator with respect to uniform procurement regulations, procurement policies, regulations, procedures, and forms, procurement data, and procurement personnel.

Subsec. (e). Pub. L. 96-83, §4(d), substituted provisions relating to consultation functions of the Administrator with respect to the development and implementation of the uniform procurement system, for provisions relating to the consultation functions of the Administrator with respect to the development of policies, regulations, procedures and forms to be authorized or prescribed by such Administrator.

Subsecs. (h) to (j). Pub. L. 96-83, §4(e), added subsecs. (h) to (j).

## EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as a note under section 251 of this title.

## EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by Pub. L. 96-83 effective Oct. 1, 1979, see section 12 of Pub. L. 96-83, set out as a note under section 401 of this title.

## CONGRESSIONAL FINDINGS REGARDING CONSIDERATION OF PAST CONTRACT PERFORMANCE

Section 1091(b)(1) of Pub. L. 103-355 provided that: “Congress makes the following findings:

“(A) Past contract performance of an offeror is one of the relevant factors that a contracting official of an executive agency should consider in awarding a contract.

“(B) It is appropriate for a contracting official to consider past contract performance of an offeror as an indicator of the likelihood that the offeror will successfully perform a contract to be awarded by that official.”

## RESULTS-ORIENTED ACQUISITION PROCESS

Section 5052 of Pub. L. 103-355 provided that:

“(a) DEVELOPMENT OF PROCESS REQUIRED.—The Administrator for Federal Procurement Policy, in consultation with the heads of appropriate Federal agen-

cies, shall develop results-oriented acquisition process guidelines for implementation by agencies in acquisitions of property and services by the Federal agencies. The process guidelines shall include the identification of quantitative measures and standards for determining the extent to which an acquisition of items other than commercial items by a Federal agency satisfies the needs for which the items are being acquired.

“(b) INAPPLICABILITY OF PROCESS TO DEPARTMENT OF DEFENSE.—The process guidelines developed pursuant to subsection (a) may not be applied to the Department of Defense.”

#### DEVELOPMENT OF DEFINITIONS REGARDING CERTAIN SMALL BUSINESS CONCERNS

Section 7107 of Pub. L. 103-355 provided that:

“(a) REVIEW REQUIRED.—(1) The Administrator for Federal Procurement Policy shall conduct a comprehensive review of Federal laws, as in effect on November 1, 1994, to identify and catalogue all of the provisions in such laws that define (or describe for definitional purposes) the small business concerns set forth in paragraph (2) for purposes of authorizing the participation of such small business concerns as prime contractors or subcontractors in—

“(A) contracts awarded directly by the Federal Government or subcontracts awarded under such contracts; or

“(B) contracts and subcontracts funded, in whole or in part, by Federal financial assistance under grants, cooperative agreements, or other forms of Federal assistance.

“(2) The small business concerns referred to in paragraph (1) are as follows:

“(A) Small business concerns owned and controlled by socially and economically disadvantaged individuals.

“(B) Minority-owned small business concerns.

“(C) Small business concerns owned and controlled by women.

“(D) Woman-owned small business concerns.

“(b) MATTERS TO BE DEVELOPED.—On the basis of the results of the review carried out under subsection (a), the Administrator for Federal Procurement Policy shall develop—

“(1) uniform definitions for the small business concerns referred to in subsection (a)(2);

“(2) uniform agency certification standards and procedures for—

“(A) determinations of whether a small business concern qualifies as a small business concern referred to in subsection (a)(2) under an applicable standard for purposes of contracts and subcontracts referred to in subsection (a)(1); and

“(B) reciprocal recognition by an agency of a decision of another agency regarding whether a small business concern qualifies as a small business concern referred to in subsection (a)(2) for such purposes; and

“(3) such other related recommendations as the Administrator determines appropriate consistent with the review results.

“(c) PROCEDURES AND SCHEDULE.—(1) The Administrator for Federal Procurement Policy shall provide for the participation in the review and activities under subsections (a) and (b) by representatives of—

“(A) the Small Business Administration (including the Office of the Chief Counsel for Advocacy);

“(B) the Minority Business Development Agency of the Department of Commerce;

“(C) the Department of Transportation;

“(D) the Environmental Protection Agency; and

“(E) such other executive departments and agencies as the Administrator considers appropriate.

“(2) In carrying out subsections (a) and (b), the Administrator shall consult with representatives of organizations representing—

“(A) minority-owned business enterprises;

“(B) women-owned business enterprises; and

“(C) other organizations that the Administrator considers appropriate.

“(3) Not later than 60 days after the date of the enactment of this Act [Oct. 13, 1994], the Administrator shall publish in the Federal Register a notice which—

“(A) lists the provisions of law identified in the review carried out under subsection (a);

“(B) describes the matters to be developed on the basis of the results of the review pursuant to subsection (b);

“(C) solicits public comment regarding the matters described in the notice pursuant to subparagraphs (A) and (B) for a period of not less than 60 days; and

“(D) addresses such other matters as the Administrator considers appropriate to ensure the comprehensiveness of the review and activities under subsections (a) and (b).

“(d) REPORT.—Not later than May 1, 1996, the Administrator for Federal Procurement Policy shall submit to the Committees on Small Business of the Senate and the House of Representatives a report on the results of the review carried out under subsection (a) and the actions taken under subsection (b). The report shall include a discussion of the results of the review, a description of the consultations conducted and public comments received, and the Administrator's recommendations with regard to the matters identified under subsection (b).”

#### DATA COLLECTION THROUGH FEDERAL PROCUREMENT DATA SYSTEM

Section 10004 of Pub. L. 103-355 provided that:

“(a) DATA COLLECTION REQUIRED.—The Federal Procurement Data System described in section 6(d)(4)(A) of the Office of Federal Procurement Policy Act (41 U.S.C. 405(d)(4)(A)) shall be modified to collect from contracts in excess of the simplified acquisition threshold data identifying the following matters:

“(1) Contract awards made pursuant to competitions conducted pursuant to section 2323 of title 10, United States Code, or section 7102 of the Federal Acquisition Streamlining Act of 1994 [Pub. L. 103-355, 15 U.S.C. 644 note].

“(2) Awards to business concerns owned and controlled by women.

“(3) Number of offers received in response to a solicitation.

“(4) Task order contracts.

“(5) Contracts for the acquisition of commercial items.

“(b) DEFINITION.—In this section, the term ‘simplified acquisition threshold’ has the meaning given such term in section 4(11) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(11)).”

#### PROFIT METHODOLOGY STUDY

Section 7 of Pub. L. 100-679 provided that:

“(a) IN GENERAL.—The Administrator shall conduct a study to develop a consistent methodology which executive agencies should use for measuring the profits earned by government contractors on procurements, other than procurements where the price is based on adequate price competition or on established catalog or market prices of commercial items sold in substantial quantities to the general public.

“(b) CONTRACTORS' FINANCIAL DATA.—The methodology developed under subsection (a) shall include adequate procedures for verifying and maintaining the confidentiality of contractors' financial data.”

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 407, 408, 417, 421, 422, 423 of this title; title 18 section 4124; title 31 section 6202; title 50 App. 2154.

### § 405a. Uniform Federal procurement regulations and procedures

The Administrator of the Office of Federal Procurement Policy is authorized and directed, pursuant to the authority conferred by Public

Law 93-400 and subject to the procedures set forth in such Public Law, to promulgate a single, simplified, uniform Federal procurement regulation and to establish procedures for insuring compliance with such provisions by all Federal agencies. In formulating such regulations and procedures the Administrator of the Office of Federal Procurement Policy shall, in consultation with the Small Business Administration, conduct analyses of the impact on small business concerns resulting from revised procurement regulations, and incorporate into revised procurement regulations simplified bidding, contract performance, and contract administration procedures for small business concerns.

(Pub. L. 95-507, title II, §222, Oct. 24, 1978, 92 Stat. 1771.)

#### REFERENCES IN TEXT

Public Law 93-400, referred to in text, is Pub. L. 93-400, Aug. 30, 1974, 88 Stat. 796, as amended, known as the Office of Federal Procurement Policy Act, which is classified principally to this chapter (§401 et seq.). For complete classification of this Act to the Code, see Short Title note set out under section 401 of this title and Tables.

#### CODIFICATION

Section was not enacted as part of the Office of Federal Procurement Policy Act which comprises this chapter.

#### SUPERSURE OF INCONSISTENT STATUTORY PROVISIONS

Pub. L. 96-83, §11, Oct. 10, 1979, 93 Stat. 652, provided that: "The provisions of the Act [Pub. L. 93-400, Aug. 30, 1974, 88 Stat. 796, see Short Title note set out under section 401 of this title] as amended by this Act [see Short Title of 1979 Amendment note set out under section 401 of this title] shall supersede the provisions of section 222 of the Act of October 24, 1978, entitled 'An Act to amend the Small Business Act and the Small Business Investment Act of 1958' (41 U.S.C. 405a) to the extent they are inconsistent therewith."

#### DEFINITIONS

The definitions in section 637c of Title 15, Commerce and Trade, apply to this section.

### § 405b. Conflict of interest standards for individuals providing consulting services

#### (a) Issuance of policy and regulations

Not later than 90 days after October 1, 1988, the Administrator of the Office of Federal Procurement Policy shall issue a policy, and not later than 180 days thereafter Government-wide regulations shall be issued under the Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.) which set forth—

(1) conflict of interest standards for persons who provide consulting services described in subsection (b) of this section; and

(2) procedures, including such registration, certification, and enforcement requirements as may be appropriate, to promote compliance with such standards.

#### (b) Services subject to regulations

The regulations required by subsection (a) of this section shall apply to the following types of consulting services:

(1) advisory and assistance services provided to the Government to the extent necessary to identify and evaluate the potential for con-

licts of interest that could be prejudicial to the interests of the United States;

(2) services related to support of the preparation or submission of bids and proposals for Federal contracts to the extent that inclusion of such services in such regulations is necessary to identify and evaluate the potential for conflicts of interest that could be prejudicial to the interests of the United States; and

(3) such other services related to Federal contracts as may be specified in the regulations prescribed under subsection (a) of this section to the extent necessary to identify and evaluate the potential for conflicts of interest that could be prejudicial to the interests of the United States.

#### (c) Report to Congress by Comptroller General on effectiveness of regulations

The Comptroller General shall report to Congress not later than one year after October 1, 1988, his assessment of the effectiveness of the regulations prescribed under this section.

#### (d) Intelligence activities exemption; annual report by Director of Central Intelligence

Intelligence activities as defined in section 3.4(e) of Executive order 12333 or a comparable definitional section in any successor order may be exempt from the regulations required by subsection (a) of this section: *Provided*, That the Director of Central Intelligence shall report to the Intelligence and Appropriations Committees of the Congress no later than January 1, 1990, and annually thereafter delineating those activities and organizations which have been exempted from the regulations required by subsection (a) of this section in accordance with the provisions of this subsection.

#### (e) Adverse effect determination by President prior to issuance of regulations; report to Congressional committees; voiding of regulations requirement

The President shall, before issuance of the regulations required by subsection (a) of this section, determine if the promulgation of such regulations would have a significantly adverse effect on the accomplishment of the mission of the Department of Defense or other Federal Government agencies: *Provided*, That if the President determines that the regulations required by subsection (a) of this section would have such an adverse effect, the President shall so report to the appropriate committees of the Senate and the House of Representatives, stating in full the reasons for such a determination: *Provided further*, That in the event of submission of a report to the committees containing an adverse effect determination, the requirement for the regulations prescribed by subsection (a) of this section shall be null and void.

(Pub. L. 100-463, title VIII, §8141, Oct. 1, 1988, 102 Stat. 2270-47.)

#### REFERENCES IN TEXT

The Office of Federal Procurement Policy Act, referred to in subsec. (a), is Pub. L. 93-400, Aug. 30, 1974, 88 Stat. 796, as amended, which is classified principally to this chapter (§401 et seq.). For complete classification of this Act to the Code, see Short Title note set out under section 401 of this title.

Executive order 12333, referred to in subsec. (d), is set out as a note under section 401 of Title 50, War and National Defense.

#### CODIFICATION

Section was enacted as part of the Department of Defense Appropriations Act, 1989, and not as part of the Office of Federal Procurement Policy Act which comprises this chapter.

### § 406. Administrative powers

Upon the request of the Administrator, each executive agency is directed to—

(1) make its services, personnel, and facilities available to the Office to the greatest practicable extent for the performance of functions under this chapter; and

(2) except when prohibited by law, furnish to the Administrator and give him access to all information and records in its possession which the Administrator may determine to be necessary for the performance of the functions of the Office.

(Pub. L. 93-400, § 7, Aug. 30, 1974, 88 Stat. 798.)

### § 407. Responsiveness to Congress

#### (a) Annual report on activities

The Administrator shall keep the Congress and its duly authorized committees fully and currently informed of the major activities of the Office of Federal Procurement Policy, and shall submit a report thereon to the House of Representatives and the Senate annually and at such other times as may be necessary for this purpose.

#### (b) Submission of policy matter or regulation to Congressional committees

At least 30 days prior to the effective date of any policy or regulation prescribed under section 405(a) of this title, the Administrator shall transmit to the Congress a report on the proposed policy or regulation. Such report shall include—

(1) a full description of the policy or regulation;

(2) a summary of the reasons for the issuance of such policy or regulation; and

(3) the names and positions of employees of the Office who will be made available, prior to such effective date, for full consultation with such Committees regarding such policy or regulation.

#### (c) Waiver of notice requirement by President

In the case of an emergency, the President may waive the notice requirement of subsection (b) of this section by submitting in writing to the Congress his reasons therefor at the earliest practicable date on or before the effective date of any policy or regulation.

(Pub. L. 93-400, § 8, Aug. 30, 1974, 88 Stat. 798; Pub. L. 96-83, § 5, Oct. 10, 1979, 93 Stat. 651; Pub. L. 98-191, § 8(a), Dec. 1, 1983, 97 Stat. 1331.)

#### AMENDMENTS

1983—Subsec. (a). Pub. L. 98-191, § 8(a)(1), struck out paragraph designation “(1)” before “The Administrator shall keep” and struck out pars. (2), (3), and (4) which related, respectively, to a proposal to congress by the Administrator of a uniform procurement system, a rec-

ommendation to congress of changes in legislation relating to procurement by executive agencies, and a proposal to congress for a management system to implement and enforce a uniform procurement system.

Subsec. (b). Pub. L. 98-191, § 8(a)(2)(A), substituted “At least 30 days prior to the effective date of any policy or regulation prescribed under section 405(a) of this title, the Administrator shall transmit to the Congress a report on the proposed policy or regulation” for “At least 30 days prior to the effective date of any policy prescribed under section 405(h) of this title, the Administrator shall transmit to the Committees on Government Operations of the House of Representatives and of the Senate a detailed report on the proposed policy”.

Pub. L. 98-191, § 8(a)(2)(B), inserted “or regulation” after “policy” wherever appearing in second sentence.

Subsec. (c). Pub. L. 98-191, § 8(3), substituted “any policy or regulation” for “any policy”.

1979—Subsec. (a). Pub. L. 96-83, § 5(a), designated existing provisions as par. (1), struck out references to President of the Senate and Speaker of the House, and provisions requiring the report to contain appropriate legislative recommendations, and added pars. (2) to (4).

Subsec. (b). Pub. L. 96-83, § 5(b)(1), (2), substituted “any policy prescribed under section 405(h)” for “any major policy or regulation prescribed under section 405(a)”, and “policy” for “policy or regulation” wherever appearing.

Subsec. (c). Pub. L. 96-83, § 5(b)(3), substituted “policy” for “major policy or regulation”.

#### EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by Pub. L. 96-83 effective Oct. 1, 1979, see section 12 of Pub. L. 96-83, set out as a note under section 401 of this title.

PLAN FOR ALTERNATIVES TO INCREASE OPPORTUNITIES TO ACHIEVE FULL AND OPEN COMPETITION; STUDY TO CONGRESS, CRITERIA, ETC.

Pub. L. 98-369, div. B, title VII, § 2753, July 18, 1984, 98 Stat. 1203, directed Administrator of Office of Federal Procurement Policy, in consultation with Secretary of Defense, Administrator of General Services and Administrator of the National Aeronautics and Space Administration, not later than Jan. 31, 1985, to complete a study of alternatives and recommend to Congress a plan to increase opportunities to achieve full and open competition on the basis of technical qualifications, quality, and other factors in the procurement of professional, technical, and managerial services.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 421 of this title.

### § 408. Applicability of existing laws

The authority of an executive agency under any other law to prescribe policies, regulations, procedures, and forms for procurement is subject to the authority conferred in section 405 of this title.

(Pub. L. 93-400, § 9, Aug. 30, 1974, 88 Stat. 799.)

### § 409. Effect on existing regulations

Procurement policies, regulations, procedures, or forms in effect on December 1, 1983, shall continue in effect, as modified from time to time, until repealed, amended, or superseded by policies, regulations, procedures, or forms promulgated by the Administrator.

(Pub. L. 93-400, § 10, Aug. 30, 1974, 88 Stat. 799; Pub. L. 96-83, § 6, Oct. 10, 1979, 93 Stat. 651; Pub. L. 98-191, § 8(b), Dec. 1, 1983, 97 Stat. 1331.)

#### AMENDMENTS

1983—Pub. L. 98-191 substituted “Procurement policies, regulations, procedures, or forms in effect on De-

cember 1, 1983, shall continue in effect, as modified from time to time, until repealed, amended, or superseded by policies, regulations, procedures, or forms promulgated by the Administrator” for “Procurement policies, regulations, procedures, or forms in effect as of October 10, 1979, shall continue in effect, as modified from time to time by the issuing offices on their own initiative or in response to policy directives issued under section 405(h) of this title until repealed, amended, or superseded pursuant to the adoption of the uniform procurement system described in section 405 of this title.”

1979—Pub. L. 96-83 substituted provisions setting forth applicability of procurement policies, etc., as of Oct. 10, 1979, for provisions setting forth applicability of procurement policies, etc., as of Aug. 30, 1974.

#### EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by Pub. L. 96-83 effective Oct. 1, 1979, see section 12 of Pub. L. 96-83, set out as a note under section 401 of this title.

### § 410. Authorization of appropriations

There are authorized to be appropriated to carry out the provisions of this chapter, and for no other purpose, \$4,500,000 for the fiscal year ending September 30, 1984, and such sums as may be necessary for each succeeding fiscal year.

(Pub. L. 93-400, § 11, Aug. 30, 1974, 88 Stat. 799; Pub. L. 96-83, § 7, Oct. 10, 1979, 93 Stat. 651; Pub. L. 98-191, § 6, Dec. 1, 1983, 97 Stat. 1329; Pub. L. 100-679, § 3(b), Nov. 17, 1988, 102 Stat. 4056.)

#### AMENDMENTS

1988—Pub. L. 100-679 substituted “such sums as may be necessary for each succeeding fiscal year” for “for each of the three succeeding fiscal years”.

1983—Pub. L. 98-191 amended section generally, substituting provisions authorizing appropriations of \$4,500,000 for the fiscal year ending Sept. 30, 1984, and for each of the three succeeding fiscal years for provisions authorizing appropriations of \$4,000,000 for the fiscal year ending Sept. 30, 1980, and for each of the three succeeding fiscal years and requiring that future authorization of appropriations to carry out the purposes of this chapter be referred to the Senate Committee on Governmental Affairs.

1979—Pub. L. 96-83 substituted provisions authorizing appropriations of \$4,000,000 for the fiscal year ending Sept. 30, 1980, and for each of the three succeeding fiscal years, such funds not to be used for any other purpose, with one-third of the appropriations to be made available to the Federal Acquisition Institute, for provisions authorizing appropriations of not to exceed \$2,000,000 for the fiscal year ending June 30, 1975, of which not to exceed \$150,000 was to be available for the purposes of former section 405(d)(4) of this title, and such other sums as necessary for each of the four fiscal years thereafter, and substituted “Governmental Affairs” for “Government Operations”.

#### EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by Pub. L. 96-83 effective Oct. 1, 1979, see section 12 of Pub. L. 96-83, set out as a note under section 401 of this title.

### § 411. Delegation of authority by Administrator

(a) The Administrator may delegate, and authorize successive redelegations of, any authority, function, or power of the Administrator under this chapter (other than the authority to provide overall direction of Federal procurement policy and to prescribe policies and regulations to carry out such policy), to any other executive agency with the consent of the head of

such executive agency or at the direction of the President.

(b) The Administrator may make and authorize such delegations within the Office as he determines to be necessary to carry out the provisions of this chapter.

(Pub. L. 93-400, § 12, Aug. 30, 1974, 88 Stat. 799; Pub. L. 96-83, § 8, Oct. 10, 1979, 93 Stat. 652; Pub. L. 98-191, § 8(c), Dec. 1, 1983, 97 Stat. 1331.)

#### AMENDMENTS

1983—Subsec. (a). Pub. L. 98-191 substituted “The Administrator may delegate, and authorize successive redelegations of, any authority, function, or power of the Administrator under this chapter (other than the authority to provide overall direction of Federal procurement policy and to prescribe policies and regulations to carry out such policy), to any other executive agency with the consent of the head of such executive agency or at the direction of the President” for “The Administrator may delegate, and authorize successive redelegations of, any authority, function, or power under this chapter, other than his basic authority to provide overall leadership in the development of Federal procurement policy, to any other executive agency with the consent of such agency or at the direction of the President”.

1979—Subsec. (a). Pub. L. 96-83 substituted provisions respecting delegation of the leadership role in the development of policy, for provisions respecting delegation of the direction of policy and the authority to prescribe rules and regulations to effectuate that policy.

#### EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by Pub. L. 96-83 effective Oct. 1, 1979, see section 12 of Pub. L. 96-83, set out as a note under section 401 of this title.

### § 412. Comptroller General's access to information from Administrator; rule making procedure

(a) The Administrator and personnel in his Office shall furnish such information as the Comptroller General may require for the discharge of his responsibilities. For this purpose, the Comptroller General or his representatives shall have access to all books, documents, papers, and records of the Office.

(b) The Administrator shall, by regulation, require that formal meetings of the Office, as designated by him, for the purpose of developing procurement policies and regulations shall be open to the public, and that public notice of each such meeting shall be given not less than ten days prior thereto.

(Pub. L. 93-400, § 14, Aug. 30, 1974, 88 Stat. 800; Pub. L. 96-83, § 9, Oct. 10, 1979, 93 Stat. 652.)

#### AMENDMENTS

1979—Subsec. (b). Pub. L. 96-83 substituted “developing” for “establishing”.

#### EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by Pub. L. 96-83 effective Oct. 1, 1979, see section 12 of Pub. L. 96-83, set out as a note under section 401 of this title.

### § 413. Tests of innovative procurement methods and procedures

(a) The Administrator may develop innovative procurement methods and procedures to be tested by selected executive agencies. The innovative procurement methods and procedures tested

under this subsection shall be consistent with the policies set forth in section 401 of this title. In developing any program to test innovative procurement methods and procedures under this subsection, the Administrator shall consult with the heads of executive agencies to—

- (1) ascertain the need for and specify the objectives of such program;
- (2) develop the guidelines and procedures for carrying out such program and the criteria to be used in measuring the success of such program;
- (3) evaluate the potential costs and benefits which may be derived from the innovative procurement methods and procedures tested under such program;
- (4) select the appropriate executive agencies or components of executive agencies to carry out such program;
- (5) specify the categories and types of products or services to be procured under such program; and
- (6) develop the methods to be used to analyze the results of such program.

A program to test innovative procurement methods and procedures may not be carried out unless approved by the heads of the executive agencies selected to carry out such program.

(b) If the Administrator determines that it is necessary to waive the application of any provision of law in order to carry out a proposed program to test innovative procurement methods and procedures under subsection (a) of this section, the Administrator shall transmit notice of the proposed program to the Committee on Government Operations of the House of Representatives and the Committee on Governmental Affairs of the Senate and request that such committees take such action as may be necessary to provide that such provision of law does not apply with respect to the proposed program. The notification to Congress shall include a description of the proposed program (including the scope and purpose of the proposed program), the procedures to be followed in carrying out the proposed program, the provisions of law affected and any provision of law the application of which must be waived in order to carry out the proposed program, and the executive agencies involved in carrying out the proposed program.

(Pub. L. 93-400, §15, as added Pub. L. 98-191, §7, Dec. 1, 1983, 97 Stat. 1329.)

#### PRIOR PROVISIONS

A prior section 15 of Pub. L. 93-400 amended sections 474, 481, and 487 of Title 40, Public Buildings, Property, and Works.

#### CHANGE OF NAME

Committee on Government Operations of House of Representatives changed to Committee on Government Reform and Oversight of House of Representatives by House Resolution No. 6, One Hundred Fourth Congress, Jan. 4, 1995.

#### TEST PROGRAM FOR EXECUTIVE AGENCIES

Pub. L. 103-355, title V, §5061, Oct. 13, 1994, 108 Stat. 3352, provided that:

“(a) IN GENERAL.—The Administrator for Federal Procurement Policy (in this section referred to as the ‘Administrator’) may conduct a program of tests of alternative and innovative procurement procedures. To

the extent consistent with this section, such program shall be conducted consistent with section 15 of the Office of Federal Procurement Policy Act (41 U.S.C. 413). No more than 6 such tests shall be conducted under the authority of this subsection, and not more than 1 such test shall be conducted under such authority in an agency.

“(b) DESIGNATION OF AGENCIES.—Each test conducted pursuant to subsection (a) shall be carried out in not more than 2 specific procuring activities in an agency designated by the Administrator. Each agency so designated shall select the procuring activities participating in the test with the approval of the Administrator and shall designate a procurement testing official who shall be responsible for the conduct and evaluation of tests within that agency.

“(c) TEST REQUIREMENTS AND LIMITATIONS.—(1) Each test conducted under subsection (a)—

“(A) shall be developed and structured by the Administrator or by the agency senior procurement executive designated pursuant to section 16(3) of the Office of Federal Procurement Policy Act (41 U.S.C. 414(3)) in close coordination with the Administrator; and

“(B) shall be limited to specific programs of agencies or specific acquisitions.

“(2) The total estimated life-cycle cost to the Federal Government for each test conducted under subsection (a) may not exceed \$100,000,000.

“(3)(A) Except as provided in subparagraph (B), each contract awarded in conducting the tests under subsection (a) (including the cost of options if all options were to be exercised) may not exceed \$5,000,000.

“(B) For one of the tests conducted under subsection (a), the amount of each contract awarded in conducting the test (including options) may exceed \$5,000,000.

“(4) The program of tests conducted under subsection (a) shall include, either as a test or as part of a test, the use of the Federal acquisition computer network (‘FACNET’) capability required by section 30 of the Office of Federal Procurement Policy Act (as added by section 9001) [41 U.S.C. 426] for procurement actions in amounts greater than the simplified acquisition threshold.

“(d) LIMITATION ON TOTAL VALUE OF CONTRACTS UNDER PROGRAM.—(1) The Administrator shall ensure that the total amount obligated under contracts awarded pursuant to the program under this section does not exceed \$600,000,000. In calculating such amount, the Administrator shall not include any contract awarded for the test conducted by the National Aeronautics and Space Administration pursuant to section 5062 of this Act [42 U.S.C. 2473 note].

“(2) The Administrator shall monitor the value of contracts awarded pursuant to the program under this section.

“(3) No contract may be awarded under the program under this section if the award of the contract would result in obligation of more than \$600,000,000 under contracts awarded pursuant to the program under this section.

“(e) PROCEDURES AUTHORIZED.—Tests conducted under this section may include any of the following procedures:

“(1) Publication of agency needs before drafting of a solicitation.

“(2) Issuance of draft solicitations for comment.

“(3) Streamlined solicitations that specify as the evaluation factors the minimum factors necessary, require sources to submit the minimum information necessary, provide abbreviated periods for submission of offers, and specify page limitations for offers.

“(4) Limitation of source selection factors to—

“(A) cost to the Federal Government;

“(B) past experience and performance; and

“(C) quality of the content of the offer.

“(5) Evaluation of proposals by small teams of highly qualified people over a period not greater than 30 days.

“(6) Restriction of competitions to sources determined capable in a precompetition screening process,

provided that the screening process affords all interested sources a fair opportunity to be considered.

“(7) Restriction of competitions to sources of pre-evaluated products, provided that the preevaluation process affords all interested sources a fair opportunity to be considered.

“(8) Alternative notice and publication requirements.

“(9) A process in which—

“(A) the competitive process is initiated by publication in the Commerce Business Daily, or by dissemination through FACNET, of a notice that—

“(i) contains a synopsis of the functional and performance needs of the executive agency conducting the test, and, for purposes of guidance only, other specifications; and

“(ii) invites any interested source to submit information or samples showing the suitability of its product for meeting those needs, together with a price quotation, or, if appropriate, showing the source's technical capability, past performance, product supportability, or other qualifications (including, as appropriate, information regarding rates and other cost-related factors);

“(B) contracting officials develop a request for proposals (including appropriate specifications and evaluation criteria) after reviewing the submissions of interested sources and, if the officials determine necessary, after consultation with those sources; and

“(C) a contract is awarded after a streamlined competition that is limited to all sources that timely provided product information in response to the notice or, if appropriate, to those sources determined most capable based on the qualification-based factors included in an invitation to submit information pursuant to subparagraph (A).

“(f) MEASURABLE TEST CRITERIA.—The Administrator shall require each agency conducting a test pursuant to subsection (a) to establish, to the maximum extent practicable, measurable criteria for evaluation of the effects of the procedure or technique to be tested.

“(g) TEST PLAN.—At least 270 days before a test may be conducted under this section, the Administrator shall—

“(1) provide a detailed test plan, including lists of any regulations that are to be waived, and any written determination under subsection (h)(1)(B) to the Committee on Government Operations [now Committee on Government Reform and Oversight] of the House of Representatives and the Committee on Governmental Affairs of the Senate;

“(2) provide a copy of the plan to the appropriate authorization and appropriations committees of the House of Representatives and the Senate; and

“(3) publish the plan in the Federal Register and provide an opportunity for public comment.

“(h) WAIVER OF PROCUREMENT REGULATIONS.—(1) For purposes of a test conducted under subsection (a), the Administrator may waive—

“(A) any provision of the Federal Acquisition Regulation that is not required by statute; and

“(B) any provision of the Federal Acquisition Regulation that is required by a provision of law described in paragraph (2), the waiver of which the Administrator determines in writing to be necessary to conduct any test of any of the procedures described in subsection (e).

“(2) The provisions of law referred to in paragraph (1) are as follows:

“(A) The following provisions of title 10, United States Code:

“(i) Section 2304.

“(ii) Section 2305.

“(iii) Section 2319.

“(B) Subsections (e), (f), and (g) of section 8 of the Small Business Act (15 U.S.C. 637).

“(C) The following provisions of the Revised Statutes:

“(i) Section 3709 (41 U.S.C. 5).

“(ii) Section 3710 (41 U.S.C. 8).

“(iii) Section 3735 (41 U.S.C. 13).

“(D) The following provisions of the Federal Property and Administrative Services Act of 1949:

“(i) Section 303 (41 U.S.C. 253).

“(ii) Section 303A (41 U.S.C. 253a).

“(iii) Section 303B (41 U.S.C. 253b).

“(iv) Section 303C (41 U.S.C. 253c).

“(v) Section 310 (41 U.S.C. 260).

“(E) The following provisions of the Office of Federal Procurement Policy Act:

“(i) Section 4(6) (41 U.S.C. 403(6)).

“(ii) Section 18 (41 U.S.C. 416).

“(3) If the Administrator determines that the conduct of a test requires the waiver of a law not listed in paragraph (2) or requires approval of an estimated dollar amount not permitted under subsection (c)(4), the Administrator may propose legislation to authorize the waiver or grant the approval. Before proposing such legislation, the Administrator may provide and publish a test plan as described in subsection (g).

“(i) REPORT.—Not later than 6 months after completion of a test conducted under subsection (a), the Comptroller General shall submit to Congress a report for the test setting forth in detail the results of the test, including such recommendations as the Comptroller General considers appropriate.

“(j) COMMENCEMENT AND EXPIRATION OF AUTHORITY.—

(1) The Administrator may not exercise the authority to conduct a test under subsection (a) in an agency and to award contracts under such a test before the date on which the head of the agency certifies to Congress under section 30A(a)(2) of the Office of Federal Procurement Policy Act [41 U.S.C. 426a(a)(2)] that the agency has implemented a full FACNET capability.

“(2) The authority to conduct a test under subsection (a) in an agency and to award contracts under such a test shall expire 4 years after the date on which the head of the agency makes the certification referred to in paragraph (1). Contracts entered into before such authority expires in an agency pursuant to a test shall remain in effect, notwithstanding the expiration of the authority to conduct the test under this section.

“(k) RULE OF CONSTRUCTION.—Nothing in this section shall be construed as authorizing the appropriation or obligation of funds for the tests conducted pursuant to subsection (a).”

#### § 414. Executive agency responsibilities

To further achieve effective, efficient, and economic administration of the Federal procurement system, the head of each executive agency shall, in accordance with applicable laws, Government-wide policies and regulations, and good business practices—

(1) increase the use of full and open competition in the procurement of property or services by the executive agency by establishing policies, procedures, and practices that assure that the executive agency receives a sufficient number of sealed bids or competitive proposals from responsible sources to fulfill the Government's requirements (including performance and delivery schedules) at the lowest reasonable cost considering the nature of the property or service procured;

(2) establish clear lines of authority, accountability, and responsibility for procurement decisionmaking within the executive agency, including placing the procurement function at a sufficiently high level in the executive agency to provide—

(A) direct access to the head of the major organizational element of the executive agency served; and

(B) comparative equality with organizational counterparts;



(3) designate a senior procurement executive who shall be responsible for management direction of the procurement system of the executive agency, including implementation of the unique procurement policies, regulations, and standards of the executive agency; and

(4) develop and maintain a procurement career management program in the executive agency to assure an adequate professional work force.

(Pub. L. 93-400, §16, as added Pub. L. 98-191, §7, Dec. 1, 1983, 97 Stat. 1330; amended Pub. L. 98-369, div. B, title VII, §2732(b)(2), July 18, 1984, 98 Stat. 1199.)

#### AMENDMENTS

1984—Par. (1). Pub. L. 98-369 substituted “increase the use of full and open competition in the procurement of property or services by the executive agency by establishing policies, procedures, and practices that assure that the executive agency receives a sufficient number of sealed bids or competitive proposals from responsible sources to fulfill the Government’s requirements (including performance and delivery schedules) at the lowest reasonable cost considering the nature of the property or service procured;” for “increase the use of effective competition in procurement by the executive agency;”.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 252c, 253, 418, 421 of this title; title 10 sections 133, 2302c, 2304, 2435; title 15 section 637; title 49 section 40110.

#### § 414a. Personnel evaluation

The head of each executive agency that is subject to the provisions of title III of the Federal Property and Administrative Services Act of 1949 [41 U.S.C. 251 et seq.] shall ensure, with respect to the employees of that agency whose primary duties and responsibilities pertain to the award of contracts subject to the provisions of this Act, that the performance appraisal system applicable to such employees affords appropriate recognition to, among other factors, efforts—

(1) to increase competition and achieve cost savings through the elimination of procedures that unnecessarily inhibit full and open competition;

(2) to further the purposes of the Small Business and Federal Procurement Competition Enhancement Act of 1984 and the Defense Procurement Reform Act of 1984; and

(3) to further such other objectives and purposes of the Federal acquisition system as may be authorized by law.

(Pub. L. 98-577, title V, §502, Oct. 30, 1984, 98 Stat. 3085.)

#### REFERENCES IN TEXT

The Federal Property and Administrative Services Act of 1949, as amended, referred to in provision preceding par. (1), is act June 30, 1949, ch. 288, 63 Stat. 393, as amended. Title III of the Federal Property and Administrative Services Act of 1949 is classified generally to subchapter IV (§251 et seq.) of chapter 4 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 471 of Title 40, Public Buildings, Property, and Works, and Tables.

This Act and the Small Business and Federal Procurement Competition Enhancement Act of 1984, referred to in provision preceding par. (1) and par. (2), is Pub. L. 98-577, Oct. 30, 1984, 98 Stat. 3066. For complete

classification of this Act to the Code, see Short Title note set out under section 251 of this title and Tables.

The Defense Procurement Reform Act of 1984, referred to in par. (2), is Pub. L. 98-525, title XII, Oct. 19, 1984, 98 Stat. 2588. For complete classification of this Act to the Code, see Short Title of 1984 Amendment note set out under section 2302 of Title 10, Armed Forces, and Tables.

#### CODIFICATION

Section was enacted as part of the Small Business and Federal Procurement Competition Enhancement Act of 1984, and not as part of the Office of Federal Procurement Policy Act which comprises this chapter.

#### § 415. Repealed. Pub. L. 103-355, title VI, §6003, Oct. 13, 1994, 108 Stat. 3364

Section, Pub. L. 93-400, §17, as added Pub. L. 98-191, §7, Dec. 1, 1983, 97 Stat. 1330, directed Administrator to conduct studies and issue report by Apr. 1, 1984, to Congressional committees on extent of competition in award of subcontracts by Federal prime contractors.

#### EFFECTIVE DATE OF REPEAL

For effective date and applicability of repeal, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

#### § 416. Procurement notice

##### (a) Covered executive agency activities; publication of notice; time limitations

(1) Except as provided in subsection (c) of this section—

(A) an executive agency intending to—

(i) solicit bids or proposals for a contract for property or services for a price expected to exceed \$25,000; or

(ii) place an order, expected to exceed \$25,000, under a basic agreement, basic ordering agreement, or similar arrangement,

shall furnish for publication by the Secretary of Commerce a notice of solicitation described in subsection (b) of this section;

(B) an executive agency intending to solicit bids or proposals for a contract for property or services shall post, for a period of not less than ten days, in a public place at the contracting office issuing the solicitation a notice of solicitation described in subsection (f)<sup>1</sup> of this section—

(i) in the case of an executive agency other than the Department of Defense, if the contract is for a price expected to exceed \$10,000, but not to exceed \$25,000; and

(ii) in the case of the Department of Defense, if the contract is for a price expected to exceed \$5,000, but not to exceed \$25,000; and

(C) an executive agency awarding a contract for property or services for a price exceeding \$25,000, or placing an order referred to in clause (A)(ii) exceeding \$25,000, shall furnish for publication by the Secretary of Commerce a notice announcing the award or order if there is likely to be any subcontract under such contract or order.

(2) The Secretary of Commerce shall publish promptly in the Commerce Business Daily each notice required by paragraph (1).

<sup>1</sup> So in original. Probably should be subsection “(b)”.

(3) Whenever an executive agency is required by paragraph (1)(A) to furnish a notice to the Secretary of Commerce, such executive agency may not—

(A) issue the solicitation earlier than 15 days after the date on which the notice is published by the Secretary of Commerce; or

(B) in the case of a contract or order expected to be greater than the simplified acquisition threshold, establish a deadline for the submission of all bids or proposals in response to the notice required by paragraph (1)(A) that—

(i) in the case of an order under a basic agreement, basic ordering agreement, or similar arrangement, is earlier than the date 30 days after the date the notice required by paragraph (1)(A)(ii) is published;

(ii) in the case of a solicitation for research and development, is earlier than the date 45 days after the date the notice required by paragraph (1)(A)(i) is published; or

(iii) in any other case, is earlier than the date 30 days after the date the solicitation is issued.

(4) An executive agency intending to solicit offers for a contract for which a notice of solicitation is required to be posted under paragraph (1)(B) shall ensure that contracting officers consider each responsive offer timely received from an offeror.

(5) An executive agency shall establish a deadline for the submission of all bids or proposals in response to a solicitation with respect to which no such deadline is provided by statute. Each deadline for the submission of offers shall afford potential offerors a reasonable opportunity to respond.

(6) The Administrator shall prescribe regulations defining limited circumstances in which flexible deadlines can be used under paragraph (3) for the submission of bids or proposals for the procurement of commercial items.

#### (b) Contents of notice

Each notice of solicitation required by subparagraph (A) or (B) of subsection (a)(1) shall include—

(1) an accurate description of the property or services to be contracted for, which description (A) shall not be unnecessarily restrictive of competition, and (B) shall include, as appropriate, the agency nomenclature, National Stock Number or other part number, and a brief description of the item's form, fit, or function, physical dimensions, predominant material of manufacture, or similar information that will assist a prospective contractor to make an informed business judgment as to whether a copy of the solicitation should be requested;

(2) provisions that—

(A) state whether the technical data required to respond to the solicitation will not be furnished as part of such solicitation, and identify the source in the Government, if any, from which the technical data may be obtained; and

(B) state whether an offeror, its product, or service must meet a qualification requirement in order to be eligible for award, and,

if so, identify the office from which the qualification requirement may be obtained;

(3) the name, business address, and telephone number of the contracting officer;

(4) a statement that all responsible sources may submit a bid, proposal, or quotation (as appropriate) which shall be considered by the agency;

(5) in the case of a procurement using procedures other than competitive procedures, a statement of the reason justifying the use of such procedures and the identity of the intended source;<sup>2</sup>

(6) in the case of a contract in an amount estimated to be greater than \$25,000 but not greater than the simplified acquisition threshold—

(A) a description of the procedures to be used in awarding the contract; and

(B) a statement specifying the periods for prospective offerors and the contracting officer to take the necessary preaward and award actions.

#### (c) Exempted, etc., activities of executive agency

(1) A notice is not required under subsection (a)(1) of this section if—

(A) the proposed procurement is for an amount not greater than the simplified acquisition threshold and is to be made through a system with interim FACNET capability certified pursuant to section 426a(a)(1) of this title or with full FACNET capability certified pursuant to section 426a(a)(2) of this title;

(B)(i) the proposed procurement is for an amount not greater than \$250,000 and is to be made through a system with full FACNET capability certified pursuant to section 426a(a)(2) of this title; and

(ii) a certification has been made pursuant to section 426a(b) of this title that Government-wide FACNET capability has been implemented;

(C) the notice would disclose the executive agency's needs and the disclosure of such needs would compromise the national security;

(D) the proposed procurement would result from acceptance of—

(i) any unsolicited proposal that demonstrates a unique and innovative research concept and the publication of any notice of such unsolicited research proposal would disclose the originality of thought or innovativeness of the proposal or would disclose proprietary information associated with the proposal; or

(ii) a proposal submitted under section 638 of title 15;

(E) the procurement is made against an order placed under a requirements contract;

(F) the procurement is made for perishable subsistence supplies;

(G) the procurement is for utility services, other than telecommunication services, and only one source is available; or

(H) the procurement is for the services of an expert for use in any litigation or dispute (in-

<sup>2</sup> So in original. Probably should be followed by "and".

cluding any reasonably foreseeable litigation or dispute) involving the Federal Government in any trial, hearing, or proceeding before any court, administrative tribunal, or agency, or in any part of an alternative dispute resolution process, whether or not the expert is expected to testify.

(2) The requirements of subsection (a)(1)(A) of this section do not apply to any procurement under conditions described in paragraph (2), (3), (4), (5), or (7) of section 253(c) of this title or paragraph (2), (3), (4), (5), or (7) of section 2304(c) of title 10.

(3) The requirements of subsection (a)(1)(A) of this section shall not apply in the case of any procurement for which the head of the executive agency makes a determination in writing, after consultation with the Administrator for Federal Procurement Policy and the Administrator of the Small Business Administration, that it is not appropriate or reasonable to publish a notice before issuing a solicitation.

**(d) Availability of complete solicitation package; payment of fee**

An executive agency shall make available to any business concern, or the authorized representative of such concern, the complete solicitation package for any on-going procurement announced pursuant to a notice of solicitation under subsection (a) of this section. An executive agency may require the payment of a fee, not exceeding the actual cost of duplication, for a copy of such package.

(Pub. L. 93-400, §18, as added Pub. L. 98-369, div. B, title VII, §2732(a), July 18, 1984, 98 Stat. 1195; amended Pub. L. 98-577, title III, §303(a), Oct. 30, 1984, 98 Stat. 3077; Pub. L. 99-500, §101(c) [title X, §922(b), (d)(2)], Oct. 18, 1986, 100 Stat. 1783-82, 1783-151, 1783-152, and Pub. L. 99-591, §101(c) [title X, §922(b), (d)(2)], Oct. 30, 1986, 100 Stat. 3341-82, 3341-151, 3341-152; Pub. L. 99-661, div. A, title IX, formerly title IV, §922(b), (d)(2), Nov. 14, 1986, 100 Stat. 3931, 3932; renumbered title IX, Pub. L. 100-26, §3(5), Apr. 21, 1987, 101 Stat. 273; Pub. L. 101-510, div. A, title VIII, §806(d), Nov. 5, 1990, 104 Stat. 1592; Pub. L. 103-355, title I, §1055(b)(1), title IV, §§4201(b), (c), 4202(a)-(c), title VIII, §8302, title IX, §9001(b), Oct. 13, 1994, 108 Stat. 3265, 3344, 3398, 3402.)

**CODIFICATION**

Pub. L. 99-591 is a corrected version of Pub. L. 99-500.

**AMENDMENTS**

1994—Subsec. (a)(1). Pub. L. 103-355, §4202(a)(1), substituted “\$25,000” for “the small purchase threshold” wherever appearing.

Subsec. (a)(1)(A). Pub. L. 103-355, §9001(b)(1), substituted “notice of solicitation” for “notice” in concluding provisions.

Subsec. (a)(3)(B). Pub. L. 103-355, §4202(a)(2), inserted “in the case of a contract or order expected to be greater than the simplified acquisition threshold,” before “establish a deadline”.

Subsec. (a)(4), (5). Pub. L. 103-355, §4201(b), (c), added pars. (4) and (5).

Subsec. (a)(6). Pub. L. 103-355, §8302, added par. (6).

Subsec. (b)(6). Pub. L. 103-355, §4202(b), added par. (6).

Subsec. (c)(1)(A) to (E). Pub. L. 103-355, §4202(c), added subpars. (A) and (B) and redesignated former subpars. (A) to (C) as (C) to (E), respectively. Former subpars. (D) and (E) redesignated (F) and (G), respectively.

Subsec. (c)(1)(F). Pub. L. 103-355, §4202(c)(1), redesignated subpar. (D) as (F). Former subpar. (F) redesignated (H).

Pub. L. 103-355, §1055(b)(1), added subpar. (F).

Subsec. (c)(1)(G), (H). Pub. L. 103-355, §4202(c)(1), redesignated subpars. (E) and (F) as (G) and (H), respectively.

Subsec. (d). Pub. L. 103-355, §9001(b)(2), substituted “a notice of solicitation under subsection (a)” for “a notice under subsection (e)” in first sentence.

1990—Subsec. (a)(1)(A). Pub. L. 101-510 substituted “the small purchase threshold; or” for “\$25,000;” in cl. (i), substituted “the small purchase threshold” for “\$25,000” and a comma for “; or” in cl. (ii), and struck out cl. (iii) which read as follows: “solicit bids or proposals for a contract for property or services for a price expected to exceed \$10,000, if there is not a reasonable expectation that at least two offers will be received from responsive and responsible offerors.”

Subsec. (a)(1)(B), (C). Pub. L. 101-510, §806(d)(1), substituted “the small purchase threshold” for “\$25,000” wherever appearing.

1986—Subsec. (a)(1)(A). Pub. L. 99-500 and Pub. L. 99-591, §101(c) [title X, §922(b)(1)], and Pub. L. 99-661, §922(b)(1), amended subpar. (A) identically, substituting “\$25,000” for “\$10,000” in cls. (i) and (ii) and adding cl. (iii).

Subsec. (a)(1)(B), (C). Pub. L. 99-500 and Pub. L. 99-591, §101(c) [title X, §922(b)(2), (3)], and Pub. L. 99-661, §922(b)(2), (3), amended par. (1) identically, adding subpar. (B) and redesignating former subpar. (B) as (C).

Subsec. (b). Pub. L. 99-500 and Pub. L. 99-591, §101(c) [title X, §922(d)(2)], and Pub. L. 99-661, §922(d)(2), amended subsec. (b) identically, substituting “subparagraph (A) or (B) of subsection (a)(1)” for “subsection (a)(1)(A)”.

1984—Subsec. (a)(1)(A). Pub. L. 98-577 designated existing provisions as cl. (i) and added cl. (ii).

Subsec. (a)(1)(B). Pub. L. 98-577 inserted “, or placing an order referred to in clause (A)(ii) exceeding \$25,000,” before “shall furnish”.

Subsec. (a)(3)(B). Pub. L. 98-577 designated existing provisions as cl. (i), substituted provisions relating to an order under a basic agreement for former provisions which related to all bids, and added cls. (ii) and (iii).

Subsec. (b)(1). Pub. L. 98-577 designated existing provisions as subpar. (A) and added subpar. (B).

Subsec. (b)(2). Pub. L. 98-577 added par. (2). Former par. (2), which related to information about the officer or employee of the executive agency who may be contacted for purposes of obtaining a copy of the solicitation, was struck out.

Subsec. (c)(1)(B). Pub. L. 98-577 designated existing provisions as cl. (i) and added cl. (ii).

Subsec. (c)(1)(E). Pub. L. 98-577 added subpar. (E).

Subsec. (d). Pub. L. 98-577 added subsec. (d).

**EFFECTIVE DATE OF 1994 AMENDMENT**

For effective date and applicability of amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as a note under section 251 of this title.

**EFFECTIVE DATE OF 1984 AMENDMENT**

Section 303(b) of Pub. L. 98-577 provided that: “The amendment made by subsection (a) [amending this section] shall take effect with respect to any solicitation issued after March 31, 1985.”

**EFFECTIVE DATE**

Section applicable to any solicitation for bids or proposals issued after Mar. 31, 1985, see section 2751 of Pub. L. 98-369, set out as an Effective Date of 1984 Amendment note under section 251 of this title.

**APPLICABILITY TO TENNESSEE VALLEY AUTHORITY**

Section 303(c) of Pub. L. 98-577 provided that: “The provisions of the amendments made by subsection (a) of this section [amending this section] shall apply to the Tennessee Valley Authority only with respect to procurements to be paid from appropriated funds.”

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 253, 253i, 253j, 426a of this title; title 10 sections 2304, 2304b, 2304c.

**§ 417. Record requirements****(a) Establishment and maintenance of computer file by executive agency; time period coverage**

Each executive agency shall establish and maintain for a period of five years a computer file, by fiscal year, containing unclassified records of all procurements greater than the simplified acquisition threshold in such fiscal year.

**(b) Contents**

The record established under subsection (a) of this section shall include—

(1) with respect to each procurement carried out using competitive procedures—

- (A) the date of contract award;
- (B) information identifying the source to whom the contract was awarded;
- (C) the property or services obtained by the Government under the procurement; and
- (D) the total cost of the procurement;

(2) with respect to each procurement carried out using procedures other than competitive procedures—

- (A) the information described in clauses (1)(A), (1)(B), (1)(C), and (1)(D);
- (B) the reason under section 253(c) of this title or section 2304(c) of title 10, as the case may be, for the use of such procedures; and
- (C) the identity of the organization or activity which conducted the procurement.

**(c) Record categories**

The information that is included in such record pursuant to subsection (b)(1) of this section and relates to procurements resulting in the submission of a bid or proposal by only one responsible source shall be separately categorized from the information relating to other procurements included in such record. The record of such information shall be designated “noncompetitive procurements using competitive procedures”.

**(d) Transmission and data system entry of information**

The information included in the record established and maintained under subsection (a) of this section shall be transmitted to the General Services Administration and shall be entered in the Federal Procurement Data System referred to in section 405(d)(4) of this section.

(Pub. L. 93-400, §19, as added Pub. L. 98-369, div. B, title VII, §2732(a), July 18, 1984, 98 Stat. 1197; amended Pub. L. 103-355, title IV, §4403, Oct. 13, 1994, 108 Stat. 3349.)

## AMENDMENTS

1994—Subsec. (a). Pub. L. 103-355 substituted “procurements greater than the simplified acquisition threshold” for “procurements, other than small purchases.”.

## EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as a note under section 251 of this title.

## EFFECTIVE DATE

Section applicable to any solicitation for bids or proposals issued after Mar. 31, 1985, see section 2751 of Pub. L. 98-369, set out as an Effective Date of 1984 Amendment note under section 251 of this title.

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 405, 427 of this title; title 40 section 759.

**§ 417a. Procurement data****(a) Reporting**

Each Federal agency shall report to the Office of Federal Procurement Policy the number of small businesses owned and controlled by women and the number of small business concerns owned and controlled by socially and economically disadvantaged businesses, by gender, that are first time recipients of contracts from such agency. The Office of Federal Procurement Policy shall take such actions as may be appropriate to ascertain for each fiscal year the number of such small businesses that have newly entered the Federal market.

**(b) Definitions**

For purposes of this section the terms “small business concern owned and controlled by women” and “small business concerns owned and controlled by socially and economically disadvantaged individuals” shall be given the same meaning as those terms are given under section 637(d) of title 15 and section 204 of this Act.

(Pub. L. 100-533, title V, §502, Oct. 25, 1988, 102 Stat. 2697.)

## REFERENCES IN TEXT

Section 204 of this Act, referred to in subsec. (b), is section 204 of Pub. L. 100-533, which is set out as a note under section 637 of Title 15, Commerce and Trade.

## CODIFICATION

Section was enacted as part of the Women's Business Ownership Act of 1988, and as part of the Office of Federal Procurement Policy Act which comprises this chapter.

**§ 418. Advocates for competition****(a) Establishment, designation, etc., in executive agency**

(1) There is established in each executive agency an advocate for competition.

(2) The head of each executive agency shall—

(A) designate for the executive agency and for each procuring activity of the executive agency one officer or employee serving in a position authorized for such executive agency on July 18, 1984 (other than the senior procurement executive designated pursuant to section 414(3) of this title) to serve as the advocate for competition;

(B) not assign such officers or employees any duties or responsibilities that are inconsistent with the duties and responsibilities of the advocates for competition; and

(C) provide such officers or employees with such staff or assistance as may be necessary to carry out the duties and responsibilities of the advocate for competition, such as persons who are specialists in engineering, technical operations, contract administration, financial

management, supply management, and utilization of small and disadvantaged business concerns.

**(b) Duties and functions**

The advocate for competition of an executive agency shall—

(1) be responsible for challenging barriers to and promoting full and open competition in the procurement of property and services by the executive agency;

(2) review the procurement activities of the executive agency;

(3) identify and report to the senior procurement executive of the executive agency designated pursuant to section 414(3) of this title—

(A) opportunities and actions taken to achieve full and open competition in the procurement activities of the executive agency; and

(B) any condition or action which has the effect of unnecessarily restricting competition in the procurement actions of the executive agency; and

(4) prepare and transmit to such senior procurement executive an annual report describing—

(A) such advocate's activities under this section;

(B) new initiatives required to increase competition; and

(C) barriers to full and open competition that remain;

(5) recommend to the senior procurement executive of the executive agency goals and the plans for increasing competition on a fiscal year basis;

(6) recommend to the senior procurement executive of the executive agency a system of personal and organizational accountability for competition, which may include the use of recognition and awards to motivate program managers, contracting officers, and others in authority to promote competition in procurement programs; and

(7) describe other ways in which the executive agency has emphasized competition in programs for procurement training and research.

**(c) Responsibilities**

The advocate for competition for each procuring activity shall be responsible for promoting full and open competition, promoting the acquisition of commercial items, and challenging barriers to such acquisition, including such barriers as unnecessarily restrictive statements of need, unnecessarily detailed specifications, and unnecessarily burdensome contract clauses.

(Pub. L. 93-400, §20, as added Pub. L. 98-369, div. B, title VII, §2732(a), July 18, 1984, 98 Stat. 1197; amended Pub. L. 103-355, title VIII, §8303(a), Oct. 13, 1994, 108 Stat. 3398.)

AMENDMENTS

1994—Subsec. (c). Pub. L. 103-355 amended subsec. (c) generally. Prior to amendment, subsec. (c) read as follows: “The advocate for competition for each procuring activity shall be responsible for challenging barriers to and promoting full and open competition in the procur-

ing activity, including unnecessarily detailed specifications and unnecessarily restrictive statements of need.”

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as a note under section 251 of this title.

EFFECTIVE DATE

Section applicable to any solicitation for bids or proposals issued after Mar. 31, 1985, see section 2751 of Pub. L. 98-369, set out as an Effective Date of 1984 Amendment note under section 251 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 10 section 2318.

**§ 418a. Rights in technical data**

**(a) Regulations; legitimate proprietary interest of United States**

The legitimate proprietary interest of the United States and of a contractor in technical or other data shall be defined in regulations prescribed as part of the single system of Government-wide procurement regulations as defined in section 403(4)<sup>1</sup> of this title. Such regulations may not impair any right of the United States or of any contractor with respect to patents or copyrights or any other right in technical data otherwise established by law. Such regulations shall provide, with respect to executive agencies that are subject to the provisions of title III of the Federal Property and Administrative Services Act of 1949 [41 U.S.C. 251 et seq.], that the United States may not require persons who have developed products or processes offered or to be offered for sale to the public as a condition for the procurement of such products or processes by the United States, to provide to the United States technical data relating to the design, development, or manufacture of such products or processes (except for such data as may be necessary for the United States to operate and maintain the product or use the process if obtained by the United States as an element of performance under the contract).

**(b) Unlimited rights; technical data; developed with Federal funds; unrestricted, royalty-free right to use; rights under law**

(1) Except as otherwise expressly provided by Federal statute, the regulations prescribed pursuant to subsection (a) of this section shall provide, with respect to executive agencies that are subject to the provisions of title III of the Federal Property and Administrative Services Act of 1949 [41 U.S.C. 251 et seq.], that the United States shall have unlimited rights in technical data developed exclusively with Federal funds if delivery of such data—

(A) was required as an element of performance under a contract; and

(B) is needed to ensure the competitive acquisition of supplies or services that will be required in substantial quantities in the future.

(2) Except as otherwise expressly provided by Federal statute, the regulations prescribed pur-

<sup>1</sup> See References in Text note below.

suant to subsection (a) of this section shall provide, with respect to executive agencies that are subject to the provisions of title III of the Federal Property and Administrative Services Act of 1949 [41 U.S.C. 251 et seq.], that the United States (and each agency thereof) shall have an unrestricted, royalty-free right to use, or to have its contractors use, for governmental purposes (excluding publication outside the Government) technical data developed exclusively with Federal funds.

(3) The requirements of paragraphs (1) and (2) shall be in addition to and not in lieu of any other rights that the United States may have pursuant to law.

**(c) Factors; regulations**

The following factors shall be considered in prescribing regulations pursuant to subsection (a) of this section:

- (1) Whether the item or process to which the technical data pertains was developed—
  - (A) exclusively with Federal funds;
  - (B) exclusively at private expense; or
  - (C) in part with Federal funds and in part at private expense.

(2) The statement of congressional policy and objectives in section 200 of title 35, the statement of purposes in section 2(b) of the Small Business Innovation Development Act of 1982 (Public Law 97-219; 15 U.S.C. 638 note), and the declaration of policy in section 631 of title 15.

(3) The interest of the United States in increasing competition and lowering costs by developing and locating alternative sources of supply and manufacture.

**(d) Provisions; contracts; regulations**

Regulations prescribed under subsection (a) of this section shall require that a contract for property or services entered into by an executive agency contain appropriate provisions relating to technical data, including provisions—

- (1) defining the respective rights of the United States and the contractor or subcontractor (at any tier) regarding any technical data to be delivered under the contract;
- (2) specifying the technical data, if any, to be delivered under the contract and delivery schedules for such delivery;
- (3) establishing or referencing procedures for determining the acceptability of technical data to be delivered under the contract;
- (4) establishing separate contract line items for the technical data, if any, to be delivered under the contract;
- (5) to the maximum practicable extent, identifying, in advance of delivery, technical data which is to be delivered with restrictions on the right of the United States to use such data;
- (6) requiring the contractor to revise any technical data delivered under the contract to reflect engineering design changes made during the performance of the contract and affecting the form, fit, and function of the items specified in the contract and to deliver such revised technical data to an agency within a time specified in the contract;
- (7) requiring the contractor to furnish written assurance at the time the technical data is

delivered or is made available that the technical data is complete and accurate and satisfies the requirements of the contract concerning technical data;

(8) establishing remedies to be available to the United States when technical data required to be delivered or made available under the contract is found to be incomplete or inadequate or to not satisfy the requirements of the contract concerning technical data; and

(9) authorizing the head of the agency to withhold payments under the contract (or exercise such other remedies as the head of the agency considers appropriate) during any period if the contractor does not meet the requirements of the contract pertaining to the delivery of technical data.

(Pub. L. 93-400, § 21, as added Pub. L. 98-577, title III, § 301(a), Oct. 30, 1984, 98 Stat. 3074; amended Pub. L. 99-145, title IX, § 961(d)(2), Nov. 8, 1985, 99 Stat. 704.)

REFERENCES IN TEXT

Section 403(4) of this title, referred to in subsec. (a), which defined “single system of Government-wide procurement regulations”, was repealed, and par. (5) of section 403 of this title was redesignated as par. (4), by Pub. L. 100-679, § 3(c), Nov. 17, 1988, 102 Stat. 4056.

The Federal Property and Administrative Services Act of 1949, as amended, referred to in subsecs. (a) and (b)(1), (2), is act June 30, 1949, ch. 288, 63 Stat. 393, as amended. Title III of the Federal Property and Administrative Services Act of 1949 is classified generally to subchapter IV (§ 251 et seq.) of chapter 4 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 471 of Title 40, Public Buildings, Property, and Works, and Tables.

PRIOR PROVISIONS

A prior section 21 of Pub. L. 93-400, as added Pub. L. 98-369, div. B, title VII, § 2732(a), July 18, 1984, 98 Stat. 1198, was renumbered section 23 by Pub. L. 98-577 and is classified to section 419 of this title.

AMENDMENTS

1985—Subsec. (c)(1). Pub. L. 99-145 substituted “the item or process to which the technical data pertains” for “the technical data”.

EFFECTIVE DATE

Section 301(c) of Pub. L. 98-577, as amended Pub. L. 99-145, title IX, § 961(d)(3), Nov. 8, 1985, 99 Stat. 704, provided that: “The amendment made by subsection (a) [enacting this section] shall take effect on the date of enactment of this Act [Oct. 30, 1984]. The regulations required by such amendment shall be issued not later than October 19, 1985.”

**§ 418b. Publication of proposed regulations**

**(a) Effective date; procurement policy, regulations, procedure or form; publication in Federal Register**

Except as provided in subsection (d) of this section, no procurement policy, regulation, procedure, or form (including amendments or modifications thereto) relating to the expenditure of appropriated funds that has (1) a significant effect beyond the internal operating procedures of the agency issuing the procurement policy, regulation, procedure or form, or (2) a significant cost or administrative impact on contractors or offerors, may take effect until 60 days after the procurement policy, regulation, procedure, or

form is published for public comment in the Federal Register pursuant to subsection (b) of this section. Notwithstanding the preceding sentence, such a policy, regulation, procedure, or form may take effect earlier than 60 days after the publication date when there are compelling circumstances for the earlier effective date, but in no event may that effective date be less than 30 days after the publication date.

**(b) Publication in Federal Register**

Subject to subsection (c) of this section, the head of the agency shall cause to be published in the Federal Register a notice of the proposed procurement policy, regulation, procedure, or form and provide for a public comment period for receiving and considering the views of all interested parties on such proposal. The length of such comment period may not be less than 30 days.

**(c) Notice; proposed policy; contents**

Any notice of a proposed procurement policy, regulation, procedure, or form prepared for publication in the Federal Register shall include—

(1) the text of the proposal or, if it is impracticable to publish the full text of the proposal, a summary of the proposal and a statement specifying the name, address, and telephone number of the officer or employee of the executive agency from whom the full text may be obtained; and

(2) a request for interested parties to submit comments on the proposal and shall include the name and address of the officer or employee of the Government designated to receive such comments.

**(d) Waiver**

(1) The requirements of subsections (a) and (b) of this section may be waived by the officer authorized to issue a procurement policy, regulation, procedure, or form if urgent and compelling circumstances make compliance with such requirements impracticable.

(2) A procurement policy, regulation, procedure, or form with respect to which the requirements of subsections (a) and (b) of this section are waived under paragraph (1) shall be effective on a temporary basis if—

(A) a notice of such procurement policy, regulation, procedure, or form is published in the Federal Register and includes a statement that the procurement policy, regulation, procedure, or form is temporary; and

(B) provision is made for a public comment period of 30 days beginning on the date on which the notice is published.

(3) After considering the comments received, the head of the agency waiving the requirements of subsections (a) and (b) of this section under paragraph (1) may issue the final procurement policy, regulation, procedure, or form.

(Pub. L. 93-400, § 22, as added Pub. L. 98-577, title III, § 302(a), Oct. 30, 1984, 98 Stat. 3076; amended Pub. L. 103-355, title V, § 5092, Oct. 13, 1994, 108 Stat. 3362.)

AMENDMENTS

1994—Subsec. (a). Pub. L. 103-355, § 5092(a), substituted “60 days” for “30 days” and inserted at end “Notwith-

standing the preceding sentence, such a policy, regulation, procedure, or form may take effect earlier than 60 days after the publication date when there are compelling circumstances for the earlier effective date, but in no event may that effective date be less than 30 days after the publication date.”

Subsec. (d). Pub. L. 103-355, § 5092(b), which directed amendment of subsec. (d) by designating second sentence as par. (3), was executed by designating second sentence of subsec. (d)(2) as par. (3) to reflect the probable intent of Congress.

EFFECTIVE DATE

Section 302(b) of Pub. L. 98-577 provided that: “The procedures required by the amendment made by subsection (a) [enacting this section] shall apply with respect to procurement policies, regulations, procedures, or forms that an agency issues in final form on or after the date which is 30 days after the date of enactment of this Act [Oct. 30, 1984].”

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 421 of this title; title 42 section 7256a; title 50 App. section 2159.

**§ 419. Contracting functions performed by Federal personnel**

**(a) Limitation on payment for advisory and assistance services**

(1) No person who is not a person described in subsection (b) of this section may be paid by an executive agency for services to conduct evaluations or analyses of any aspect of a proposal submitted for an acquisition unless personnel described in subsection (b) of this section with adequate training and capabilities to perform such evaluations and analyses are not readily available within the agency or another Federal agency, as determined in accordance with standards and procedures prescribed in the Federal Acquisition Regulation.

(2) In the administration of this subsection, the head of each executive agency shall determine in accordance with the standards and procedures set forth in the Federal Acquisition Regulation whether—

(A) a sufficient number of personnel described in subsection (b) of this section within the agency or another Federal agency are readily available to perform a particular evaluation or analysis for the head of the executive agency making the determination; and

(B) the readily available personnel have the training and capabilities necessary to perform the evaluation or analysis.

**(b) Covered personnel**

For purposes of subsection (a) of this section, the personnel described in this subsection are as follows:

(1) An employee, as defined in section 2105 of title 5.

(2) A member of the Armed Forces of the United States.

(3) A person assigned to a Federal agency pursuant to subchapter VI of chapter 33 of title 5.

**(c) Rule of construction**

Nothing in this section is intended to affect the relationship between the Federal Government and a federally funded research and development center.

(Pub. L. 93-400, §23, as added Pub. L. 103-355, title VI, §6002(a), Oct. 13, 1994, 108 Stat. 3363.)

#### PRIOR PROVISIONS

A prior section 419, Pub. L. 93-400, §23, formerly §21, as added Pub. L. 98-369, div. B, title VII, §2732(a), July 18, 1984, 98 Stat. 1198; renumbered §23, Pub. L. 98-577, title III, §301(a), Oct. 30, 1984, 98 Stat. 3074, related to annual report to be submitted to Congress by agency heads concerning actions taken to increase competition for contracts and reduce number and dollar value of noncompetitive contracts, prior to repeal by Pub. L. 103-355, title I, §1092.

#### EFFECTIVE DATE

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

#### REQUIREMENT FOR GUIDANCE AND REGULATIONS

Section 6002(b) of Pub. L. 103-355 provided that: “The Federal Acquisition Regulatory Council established by section 25(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 421(a)) shall—

“(1) review part 37 of title 48 of the Code of Federal Regulations as it relates to the use of advisory and assistance services; and

“(2) provide guidance and promulgate regulations regarding—

“(A) what actions Federal agencies are required to take to determine whether expertise is readily available within the Federal Government before contracting for advisory and technical services to conduct acquisitions; and

“(B) the manner in which personnel with expertise may be shared with agencies needing expertise for such acquisitions.”

#### § 420. Repealed. Pub. L. 103-355, title II, § 2191, Oct. 13, 1994, 108 Stat. 3315

Section, Pub. L. 93-400, §24, as added Pub. L. 99-234, title II, §201, Jan. 2, 1986, 99 Stat. 1759; amended Pub. L. 100-679, §12, Nov. 17, 1988, 102 Stat. 4070, related to limits on allowable travel expenses of Government contractors.

### § 421. Federal Acquisition Regulatory Council

#### (a) Establishment

There is established a Federal Acquisition Regulatory Council (hereinafter in this section referred to as the “Council”) to assist in the direction and coordination of Government-wide procurement policy and Government-wide procurement regulatory activities in the Federal Government.

#### (b) Membership

(1) The Council shall consist of the Administrator for Federal Procurement Policy and—

(A) the Secretary of Defense,

(B) the Administrator of National Aeronautics and Space; and

(C) the Administrator of General Services.

(2) Notwithstanding section 205(d) of the Federal Property and Administrative Services Act of 1949 [40 U.S.C. 486(d)], the officials specified in subparagraphs (A), (B), and (C) of paragraph (1) may designate to serve on and attend meetings of the Council in place of that official (A) the official assigned by statute with the responsibility for acquisition policy in each of their respective agencies or, in the case of the Secretary of Defense, an official at an organizational level not

lower than an Assistant Secretary of Defense within the Office of the Under Secretary of Defense for Acquisition and Technology; or (B) if no official of such agency is assigned by statute with the responsibility for acquisition policy for that agency, the official designated pursuant to section 414(3) of this title. No other official or employee may be designated to serve on the Council.

#### (c) Functions

(1) Subject to the provisions of section 405 of this title, the General Services Administration, the Department of Defense, and the National Aeronautics and Space Administration, pursuant to their respective authorities under title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251, et seq.), chapters 4 and 137 of title 10, and the National Aeronautics and Space Act of 1958 (42 U.S.C. 2451, et seq.), shall jointly issue and maintain in accordance with subsection (f) of this section a single Government-wide procurement regulation, to be known as the “Federal Acquisition Regulation”.

(2) Any other regulations relating to procurement issued by an executive agency shall be limited to (A) regulations essential to implement Government-wide policies and procedures within the agency, and (B) additional policies and procedures required to satisfy the specific and unique needs of the agency.

(3) The Administrator, in consultation with the Council, shall ensure that procurement regulations promulgated by executive agencies are consistent with the Federal Acquisition Regulation and in accordance with the policies set forth in section 401 of this title or any policies issued pursuant to section 405(a) of this title.

(4)(A) Under procedures established by the Administrator, a person may request the Administrator to review any regulation relating to procurement on the basis that such regulation is inconsistent with the Federal Acquisition Regulation.

(B) Unless the request is frivolous or does not, on its face, state a valid basis for such review, the Administrator shall complete such a review not later than 60 days after receiving the request. The time for completion of the review may be extended if the Administrator determines that an additional period of review is required. The Administrator shall advise the requester of the reasons for the extension and the date by which the review will be completed.

(5) If the Administrator determines that a regulation relating to procurement is inconsistent with the Federal Acquisition Regulation or that the regulation should otherwise be revised to remove an inconsistency with any policies issued under section 405(a) of this title or the policies set forth in section 401 of this title, the Administrator shall rescind or deny the promulgation of the regulation or take such other action authorized under section 405 of this title as may be necessary to remove the inconsistency. If the Administrator determines that such a regulation, although not inconsistent with the Federal Acquisition Regulation or such policies, should be revised to improve compliance with such Regulation or policies, the Administrator shall take such action authorized under section 405 of this title as may be necessary and appropriate.



(6) The decisions of the Administrator shall be in writing and made publicly available. The Administrator shall provide a listing of such decisions in the annual report to Congress required by section 407 of this title.

**(d) Additional responsibilities of membership**

Subject to the authority, direction, and control of the head of the agency concerned, each official who represents an agency on the Council pursuant to subsection (b) of this section shall—

(1) approve or disapprove all regulations that are, after 60 days after November 17, 1988, proposed for public comment, promulgated in final form, or otherwise made effective by such agency relating to procurement before such regulation may be promulgated in final form, or otherwise made effective, except that such official may grant an interim approval, without review, for not more than 60 days for a procurement regulation in urgent and compelling circumstances;

(2) carry out the responsibilities of such agency set forth in chapter 35 of title 44 for each information collection request (as that term is defined in section 3502(11) of title 44) that relates to procurement rules or regulations; and

(3) eliminate or reduce (A) any redundant or unnecessary levels of review and approval, in the procurement system of such agency, and (B) redundant or unnecessary procurement regulations which are unique to that agency.

The authority to review and approve or disapprove regulations under paragraph (1) of this subsection may not be delegated to any person outside the office of the official who represents the agency on the Council pursuant to subsection (b) of this section.

**(e) Governing policies**

All actions of the Council and of members of the Council shall be in accordance with and furtherance of the policies of section 401 of this title and the policies prescribed under section 405(a) of this title.

**(f) General authority with respect to FAR**

Subject to section 405(b) of this title, the Council shall manage, coordinate, control, and monitor the maintenance of, and issuance of and changes in, the Federal Acquisition Regulation.

**(g) Reports**

The Administrator for Federal Procurement Policy shall—

(1) publish a report within 6 months after November 17, 1988, and every 6 months thereafter relating to the development of procurement regulations to be issued in accordance with subsection (c) of this section;

(2) include in each report published under paragraph (1)—

(A) the status of each such regulation;

(B) a description of those regulations which are required by statute;

(C) a description of the methods by which public comment was sought with regard to each proposed regulation in accordance with section 418b of this title, and to the extent appropriate, sections 3504(h) and 3507 of title 44;

(D) regulatory activities completed and initiated since the last report;

(E) regulations, policies, procedures, practices, and forms that are under consideration or review by the Office of Federal Procurement Policy;

(F) whether the regulations have paperwork requirements;

(G) the progress made in promulgating and implementing the Federal Acquisition Regulation; and

(H) such other matters as the Administrator determines would be useful; and

(3) report to Congress within 180 days after November 17, 1988, in consultation with the Administrator of the Office of Information and Regulatory Affairs, regarding—

(A) the extent of the paperwork burden created by the Federal procurement process, and

(B) the extent to which the Federal procurement system can be streamlined to reduce unnecessary paperwork while at the same time maintaining recordkeeping and reporting requirements necessary to ensure the integrity and accountability of the system.

(Pub. L. 93-400, §25, as added Pub. L. 100-679, §4, Nov. 17, 1988, 102 Stat. 4056; amended Pub. L. 101-510, div. A, title VIII, §807, Nov. 5, 1990, 104 Stat. 1593; Pub. L. 103-160, div. A, title IX, §904(f), Nov. 30, 1993, 107 Stat. 1729.)

REFERENCES IN TEXT

The Federal Property and Administrative Services Act of 1949, referred to in subsec. (c)(1), is act June 30, 1949, ch. 288, 63 Stat. 377, as amended. Title III of the Act is classified generally to subchapter IV (§251 et seq.) of chapter 4 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 471 of Title 40, Public Buildings, Property, and Works, and Tables.

The National Aeronautics and Space Act of 1958, referred to in subsec. (c)(1), is Pub. L. 85-568, July 29, 1958, 72 Stat. 426, as amended, which is classified generally to chapter 26 (§2451 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 2451 of Title 42 and Tables.

AMENDMENTS

1993—Subsec. (b)(2). Pub. L. 103-160 substituted “Under Secretary of Defense for Acquisition and Technology” for “Under Secretary of Defense for Acquisition”.

1990—Subsec. (b)(2). Pub. L. 101-510 inserted before semicolon at end of cl. (A) “or, in the case of the Secretary of Defense, an official at an organizational level not lower than an Assistant Secretary of Defense within the Office of the Under Secretary of Defense for Acquisition”.

STATUS OF DIRECTOR OF DEFENSE PROCUREMENT

Pub. L. 102-190, div. A, title VIII, §809, Dec. 5, 1991, 105 Stat. 1423, as amended by Pub. L. 103-160, div. A, title IX, §904(f), Nov. 30, 1993, 107 Stat. 1729, provided that: “For the purposes of the amendment made by section 807 of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101-510; 104 Stat. 1593) to section 25(b)(2) of the Office of Federal Procurement Policy Act (41 U.S.C. 421(b)(2)), the Director of Defense Procurement of the Department of Defense shall be considered to be an official at an organizational level of an Assistant Secretary of Defense within the Office of

the Under Secretary of Defense for Acquisition and Technology.”

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 256, 259, 423 of this title; title 10 sections 2302, 2323; title 15 section 638; title 42 section 8287; title 50 App. section 2154.

**§ 422. Cost Accounting Standards Board**

**(a) Establishment; membership; terms**

(1) There is established within the Office of Federal Procurement Policy an independent board to be known as the “Cost Accounting Standards Board” (hereinafter referred to as the “Board”). The Board shall consist of 5 members, including the Administrator, who shall serve as Chairman, and 4 members, all of whom shall have experience in Government contract cost accounting, and who shall be appointed as follows:

(A) two representatives of the Federal Government—

(i) one of whom shall be a representative of the Department of Defense and be appointed by the Secretary of Defense; and

(ii) one of whom shall be an officer or employee of the General Services Administration appointed by the Administrator of General Services; and

(B) two individuals from the private sector, each of whom shall be appointed by the Administrator and—

(i) one of whom shall be a representative of industry; and

(ii) one of whom shall be particularly knowledgeable about cost accounting problems and systems.

(2)(A) The term of office of each of the members of the Board, other than the Administrator for Federal Procurement Policy, shall be 4 years, except that—

(i) of the initial members, two shall be appointed for terms of two years, one shall be appointed for a term of three years, and one shall be appointed for a term of four years;

(ii) any member appointed to fill a vacancy in the Board shall serve for the remainder of the term for which his predecessor was appointed; and

(iii) no individual who is appointed under paragraph (1)(A) of this subsection shall continue to serve after ceasing to be an officer or employee of the agency from which he or she was appointed.

(B) A vacancy on the Board shall be filled in the same manner in which the original appointment was made.

(C) The initial members of the Board shall be appointed within 120 days after November 17, 1988.

**(b) Senior staff**

The Administrator, after consultation with the Board, may appoint an executive secretary and two additional staff members without regard to the provisions of title 5 governing appointments in the competitive service, and may pay such employees without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and

General Schedule pay rates, except that no individual so appointed may receive pay in excess of the annual rate of basic pay payable for GS-18 of the General Schedule.

**(c) Other staff**

The Administrator may appoint, fix the compensation, and remove additional employees of the Board under the applicable provisions of title 5.

**(d) Detailed and temporary personnel**

(1) The Board may use, without reimbursement, any personnel of a Federal agency (with the consent of the head of the agency concerned) to serve on advisory committees and task forces to assist the Board in carrying out the functions and responsibilities of the Board under this section.

(2) The Administrator, after consultation with the Board, may procure temporary and intermittent services under section 3109(b) of title 5 of personnel for the purpose of serving on advisory committees and task forces to assist the Board in carrying out the functions and responsibilities of the Board under this section.

**(e) Compensation**

Except as otherwise provided in subsection (a) of this section, the members of the Board who are officers or employees of the Federal Government, and officers and employees of other agencies of the Federal Government who are used under subsection (d)(1) of this section, shall receive no additional compensation for services, but shall continue to be compensated by the employing Department or agency of such officer or employee. Each member of the Board appointed from private life shall receive compensation at a rate not to exceed the daily equivalent of the rate prescribed for level IV of the Executive Schedule for each day (including travel time) in which the member is engaged in the actual performance of duties vested in the Board. Individuals hired under subsection (d)(2) of this section may receive compensation at rates fixed by the Administrator, but not to exceed the daily equivalent of the rate prescribed for level V of the Federal Executive Salary Schedule under section 5316 of title 5 for each day (including travel time) in which such appointees are properly engaged in the actual performance of duties under this section. While serving away from homes or the regular place of business, Board members and other appointees serving on an intermittent basis under this section shall be allowed travel expenses in accordance with section 5703 of title 5.

**(f) Cost accounting standards authority**

(1) The Board shall have the exclusive authority to make, promulgate, amend, and rescind cost accounting standards and interpretations thereof designed to achieve uniformity and consistency in the cost accounting standards governing measurement, assignment, and allocation of costs to contracts with the United States.

(2)(A) Cost accounting standards promulgated under this section shall be mandatory for use by all executive agencies and by contractors and subcontractors in estimating, accumulating, and reporting costs in connection with pricing

and administration of, and settlement of disputes concerning, all negotiated prime contract and subcontract procurements with the United States in excess of \$500,000.

(B) Subparagraph (A) does not apply to the following contracts or subcontracts:

- (i) Contracts or subcontracts where the price negotiated is based on established catalog or market prices of commercial items sold in substantial quantities to the general public.
- (ii) Contracts or subcontracts where the price negotiated is based on prices set by law or regulation.
- (iii) Any other firm fixed-price contract or subcontract (without cost incentives) for commercial items.

(C) In this paragraph, the term “subcontract” includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor.

(3) The Administrator, after consultation with the Board, shall prescribe rules and procedures governing actions of the Board under this section. Such rules and procedures shall require that any cost accounting standard promulgated, amended, or rescinded (and interpretations thereof) shall be adopted by majority vote of the Board members.

(4) The Board is authorized—

- (A) to exempt classes or categories of contractors and subcontractors from the requirements of this section; and
- (B) to establish procedures for the waiver of the requirements of this section with respect to individual contracts and subcontracts.

**(g) Requirements for standards**

(1) Prior to the promulgation under this section of cost accounting standards and interpretations thereof, the Board shall—

(A) take into account, after consultation and discussions with the Comptroller General and professional accounting organizations, contractors, and other interested parties—

- (i) the probable costs of implementation, including inflationary effects, if any, compared to the probable benefits;
- (ii) the advantages, disadvantages, and improvements anticipated in the pricing and administration of, and settlement of disputes concerning, contracts; and
- (iii) the scope of, and alternatives available to, the action proposed to be taken;

(B) prepare and publish a report in the Federal Register on the issues reviewed under paragraph (1)(A);

(C)(i) publish an advanced notice of proposed rulemaking in the Federal Register in order to solicit comments on the report prepared pursuant to subparagraph (B);

(ii) provide all parties affected a period of not less than 60 days after such publication to submit their views and comments; and

(iii) during this 60-day period, consult with the Comptroller General and consider any recommendation the Comptroller General may make; and

(D) publish a notice of such proposed rulemaking in the Federal Register and provide all parties affected a period of not less than 60

days after such publication to submit their views and comments.

(2) Rules, regulations, cost accounting standards, and modifications thereof promulgated or amended under this section shall have the full force and effect of law, and shall become effective within 120 days after publication in the Federal Register in final form, unless the Board determines a longer period is necessary. Implementation dates for contractors and subcontractors shall be determined by the Board, but in no event shall such dates be later than the beginning of the second fiscal year of the contractor or subcontractor after the standard becomes effective. Rules, regulations, cost accounting standards, and modifications thereof promulgated or amended under this section shall be accompanied by prefatory comments and by illustrations, if necessary.

(3) The functions exercised under this section are excluded from the operation of sections 551, 553 through 559, and 701 through 706 of title 5.

**(h) Implementing regulations**

(1) The Board shall promulgate rules and regulations for the implementation of cost accounting standards promulgated or interpreted under subsection (f) of this section. Such regulations shall be incorporated into the Federal Acquisition Regulation and shall require contractors and subcontractors as a condition of contracting with the United States to—

(A) disclose in writing their cost accounting practices, including methods of distinguishing direct costs from indirect costs and the basis used for allocating indirect costs; and

(B) agree to a contract price adjustment, with interest, for any increased costs paid to such contractor or subcontractor by the United States by reason of a change in the contractor's or subcontractor's cost accounting practices or by reason of a failure by the contractor or subcontractor to comply with applicable cost accounting standards.

(2) If the United States and a contractor or subcontractor fail to agree on a contract price adjustment, including whether the contractor or subcontractor has complied with the applicable cost accounting standards, the disagreement will constitute a dispute under the Contract Disputes Act [41 U.S.C. 601 et seq.].

(3) Any contract price adjustment undertaken pursuant to paragraph (1)(B) shall be made, where applicable, on relevant contracts between the United States and the contractor that are subject to the cost accounting standards so as to protect the United States from payment, in the aggregate, of increased costs (as defined by the Board). In no case shall the Government recover costs greater than the increased cost (as defined by the Board) to the Government, in the aggregate, on the relevant contracts subject to the price adjustment, unless the contractor made a change in its cost accounting practices of which it was aware or should have been aware at the time of the price negotiation and which it failed to disclose to the Government.

(4) The interest rate applicable to any contract price adjustment shall be the annual rate of interest established under section 6621 of title

26 for such period. Such interest shall accrue from the time payments of the increased costs were made to the contractor or subcontractor to the time the United States receives full compensation for the price adjustment.

**(i) Reports to Congress**

The Board shall report to the Congress not later than one year after November 17, 1988, and annually thereafter, with respect to the activities and operations of the Board under this section, together with such recommendations as it considers appropriate.

**(j) Effect on other standards and regulations**

(1) All cost accounting standards, waivers, exemptions, interpretations, modifications, rules, and regulations promulgated by the Cost Accounting Standards Board under section 2168<sup>1</sup> of title 50, Appendix, shall remain in effect unless and until amended, superseded, or rescinded by the Board pursuant to this section.

(2) Existing cost accounting standards referred to in paragraph (1) shall be subject to the provisions of this chapter in the same manner as if promulgated by the Board under this chapter.

(3) The Administrator, under the authority set forth in section 405 of this title, shall ensure that no regulation or proposed regulation of an executive agency is inconsistent with a cost accounting standard promulgated or amended under this section by rescinding or denying the promulgation of any such inconsistent regulation or proposed regulation and taking such other action authorized under section 405 of this title as may be appropriate.

(4) Costs which are the subject of cost accounting standards promulgated under this section shall not be subject to regulations that are established by another executive agency that differ from such standards with respect to the measurement, assignment, and allocation of such costs.

**(k) Examinations**

For the purpose of determining whether a contractor or subcontractor has complied with cost accounting standards promulgated under this section and has followed consistently the contractor's or subcontractor's disclosed cost accounting practices, any authorized representative of the head of the agency concerned, of the offices of inspector general established pursuant to the Inspector General Act of 1978, or of the Comptroller General of the United States shall have the right to examine and make copies of any documents, papers, or records of such contractor or subcontractor relating to compliance with such cost accounting standards.

**(l) Authorization of appropriations**

There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section.

(Pub. L. 93-400, §26, as added Pub. L. 100-679, §5(a), Nov. 17, 1988, 102 Stat. 4058; amended Pub. L. 103-355, title II, §2453, title VIII, §8301(d), Oct. 13, 1994, 108 Stat. 3326, 3397.)

REFERENCES IN TEXT

The provisions of title 5 governing appointments in the competitive service, referred to in subsec. (b), are

<sup>1</sup> See References in Text note below.

classified generally to section 3301 et seq. of Title 5, Government Organization and Employees.

Level IV of the Executive Schedule, referred to in subsec. (e), is set out in section 5315 of Title 5.

The Contract Disputes Act, referred to in subsec. (h)(2), probably means the Contract Disputes Act of 1978, Pub. L. 95-563, Nov. 1, 1978, 92 Stat. 2383, as amended, which is classified principally to chapter 9 (§601 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 601 of this title and Tables.

Section 2168 of title 50, Appendix, referred to in subsec. (j)(1), was repealed by Pub. L. 100-679, §5(b), Nov. 17, 1988, 102 Stat. 4063.

The Inspector General Act of 1978, referred to in subsec. (k), is Pub. L. 95-452, Oct. 12, 1978, 92 Stat. 1101, as amended, which is set out in the Appendix to Title 5, Government Organization and Employees.

AMENDMENTS

1994—Subsec. (f)(2). Pub. L. 103-355, §8301(d), designated existing provisions as subpar. (A), substituted a period for “, other than contracts or subcontracts where the price negotiated is based on (A) established catalog or market prices of commercial items sold in substantial quantities to the general public, or (B) prices set by law or regulation”, and added subpars. (B) and (C).

Subsec. (f)(3). Pub. L. 103-355, §2453, substituted “The Administrator” for “Not later than 180 days after November 17, 1988, the Administrator”.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as a note under section 251 of this title.

REFERENCES IN OTHER LAWS TO GS-16, 17, OR 18 PAY RATES

References in laws to the rates of pay for GS-16, 17, or 18, or to maximum rates of pay under the General Schedule, to be considered references to rates payable under specified sections of Title 5, Government Organization and Employees, see section 529 [title I, §101(c)(1)] of Pub. L. 101-509, set out in a note under section 5376 of Title 5.

**§ 423. Procurement integrity**

**(a) Prohibited conduct by competing contractors**

During the conduct of any Federal agency procurement of property or services, no competing contractor or any officer, employee, representative, agent, or consultant of any competing contractor shall knowingly—

(1) make, directly or indirectly, any offer or promise of future employment or business opportunity to, or engage, directly or indirectly, in any discussion of future employment or business opportunity with, any procurement official of such agency, except as provided in subsection (c) of this section;

(2) offer, give, or promise to offer or give, directly or indirectly, any money, gratuity, or other thing of value to any procurement official of such agency; or

(3) solicit or obtain, directly or indirectly, from any officer or employee of such agency, prior to the award of a contract any proprietary or source selection information regarding such procurement.

**(b) Prohibited conduct by procurement officials**

During the conduct of any Federal agency procurement of property or services, no procurement official of such agency shall knowingly—

(1) solicit or accept, directly or indirectly, any promise of future employment or business opportunity from, or engage, directly or indirectly, in any discussion of future employment or business opportunity with, any officer, employee, representative, agent, or consultant of a competing contractor, except as provided in subsection (c) of this section;

(2) ask for, demand, exact, solicit, seek, accept, receive, or agree to receive, directly or indirectly, any money, gratuity, or other thing of value from any officer, employee, representative, agent, or consultant of any competing contractor for such procurement; or

(3) disclose any proprietary or source selection information regarding such procurement directly or indirectly to any person other than a person authorized by the head of such agency or the contracting officer to receive such information.

**(c) Recusal**

(1) A procurement official may engage in a discussion with a competing contractor that is otherwise prohibited by subsection (b)(1) of this section if, before engaging in such discussion—

(A) the procurement official proposes in writing to disqualify himself from the conduct of any procurement relating to the competing contractor (i) for any period during which future employment or business opportunities for such procurement official with such competing contractor have not been rejected by either the procurement official or the competing contractor, and (ii) if determined to be necessary by the head of such procuring official's procuring activity (or his designee) in accordance with criteria prescribed in implementing regulations, for a reasonable period thereafter; and

(B) the head of that procuring activity of such procurement official (or his designee), after consultation with the appropriate designated agency ethics official, approves in writing the recusal of the procurement official.

(2) A procurement official who, during the period beginning with the issuance of a procurement solicitation and ending with the award of a contract, has participated personally and substantially in the evaluation of bids or proposals, selection of sources, or conduct of negotiations in connection with such solicitation and contract may not be approved for a recusal under paragraph (1) during such period with respect to such procurement.

(3) A procurement official who, during the period beginning with the negotiation of a modification or extension of a contract and ending with—

(A) an agreement to modify or extend the contract, or

(B) a decision not to modify or extend the contract,

has participated personally and substantially in the evaluation of a proposed modification or extension or the conduct of negotiations may not be approved for a recusal under paragraph (1) during such period with respect to such procurement.

(4) A competing contractor may engage in a discussion with a procurement official that is otherwise prohibited by subsection (a)(1) of this section if, before engaging in such discussion, the procurement official has been recused in accordance with this subsection.

(5) Regulations implementing this subsection shall include specific criteria to be used in making determinations and approving recusals under paragraph (1).

**(d) Disclosure to unauthorized persons**

During the conduct of any Federal agency procurement of property or services, no person who is given authorized or unauthorized access to proprietary or source selection information regarding such procurement, shall knowingly disclose such information, directly or indirectly, to any person other than a person authorized by the head of such agency or the contracting officer to receive such information.

**(e) Certification and enforcement matters**

(1) A Federal agency may not award a contract for the procurement of property or services to any competing contractor, or agree to any modification or extension of a contract, unless the officer or employee of such contractor responsible for the offer or bid for such contract, or the modification or extension of such contract, as the case may be—

(A)(i) certifies in writing to the contracting officer responsible for such contract that such officer or employee of the competing contractor has no information concerning a violation or possible violation of subsection (a), (b), (d), or (f) of this section, or applicable implementing regulations, pertaining to such procurement; or

(ii) discloses to such contracting officer any and all such information and certifies in writing to such contracting officer that any and all such information has been disclosed; and

(B) certifies in writing to such contracting officer, except in the case of a contract for the procurement of commercial items, that each officer, employee, agent, representative, and consultant of such competing contractor who has participated personally and substantially in the preparation or submission of such bid or offer, or in such modification or extension of such contract, as the case may be, has certified to such competing contractor that he or she—

(i) is familiar with, and will comply with, the requirements of subsection (a) of this section and applicable implementing regulations; and

(ii) will report immediately to the officer or employee of the competing contractor responsible for the offer or bid for any contract or the modification or extension of such contract, as the case may be, any information concerning a violation or possible violation of subsection (a), (b), (d), or (f) of this section, or such applicable implementing regulations, pertaining to such procurement.

(2) A Federal agency may not award a contract for the procurement of property or services, or agree to any modification or extension of any

such contract, unless the contracting officer responsible for such procurement—

(A) certifies in writing to the head of such agency that the contracting officer has no information concerning a violation or possible violation of subsection (a), (b), (d), or (f) of this section, or applicable implementing regulations, pertaining to such procurement; or

(B) discloses to the head of such agency any and all such information and certifies in writing that any and all such information has been disclosed.

(3) The head of a Federal agency may require any procurement official or any competing contractor, at any time during the conduct of any Federal agency procurement of property or services—

(A) to certify in writing to the head of such agency that such procurement official or the officer or employee of the competing contractor responsible for the offer or bid for such contract or the modification or extension of such contract, as the case may be, has no information concerning a violation or possible violation of subsection (a), (b), (d), or (f) of this section, or applicable implementing regulations, pertaining to such procurement; or

(B) to disclose to the head of such agency any and all such information and to certify in writing that any and all such information has been disclosed.

(4) If a procurement official leaves the Government during the conduct of such a procurement, such official shall certify that he or she understands the continuing obligation not to disclose proprietary or source selection information.

(5) For the purposes of enforcing the requirements of this section, the contracting officer responsible for the conduct of a procurement shall maintain, as part of the procurement file—

(A) all certifications made by procurement officials and competing contractors with regard to such procurement, as required by this subsection; and

(B) a record of all persons who have been authorized by the head of the agency or the contracting officer to have access to proprietary or source selection information regarding such procurement.

(6) Any person making a certification required by this subsection shall be notified of the applicability of section 1001 of title 18 to false, fictitious, or fraudulent statements in such certification.

(7)(A) This subsection applies only to contracts, extensions, and modifications in excess of \$100,000.

(B) This subsection need not be applied to a contract—

(i) with a foreign government or an international organization that is not required to be awarded using competitive procedures pursuant to section 253(c)(4) of this title or section 2304(c)(4) of title 10; or

(ii) in an exceptional case, when the head of the Federal agency concerned determines in writing that this subsection should be waived pursuant to procedures and criteria established in implementing regulations issued pursuant to subsection (o) of this section and no-

tifies the Congress in writing of such determination.

The authority to make determinations under clause (ii) of this subparagraph may not be delegated.

**(f) Restrictions resulting from procurement activities of procurement officials**

(1) No individual who, while serving as an officer or employee of the Government or member of the Armed Forces, was a procurement official with respect to a particular procurement may knowingly—

(A) participate in any manner, as an officer, employee, agent, or representative of a competing contractor, in any negotiations leading to the award, modification, or extension of a contract for such procurement, or

(B) participate personally and substantially on behalf of the competing contractor in the performance of such contract,

during the period ending 2 years after the last date such individual participated personally and substantially in the conduct of such procurement or personally reviewed and approved the award, modification, or extension of any contract for such procurement.

(2) This subsection does not apply to any participation referred to in paragraph (1)(A) or (1)(B) with respect to a subcontractor who is a competing contractor unless—

(A) the subcontractor is a first or second tier subcontractor and the subcontract is for an amount that is in excess of \$100,000;

(B) the subcontractor significantly assisted the prime contractor with respect to negotiation of the prime contract;

(C) the procurement official involved in the award, modification, or extension of the prime contract personally directed or recommended the particular subcontractor to the prime contractor as a source for the subcontract; or

(D) the procurement official personally reviewed and approved the award, modification, or extension of the subcontract.

(3)(A)(i) The President may grant a waiver of a restriction imposed by paragraph (1) (relating to post-Government service employment) to an officer or employee described in subparagraph (B) if the President determines and certifies in writing that it is in the public interest to grant the waiver and that the services of the officer or employee are critically needed for the benefit of the Federal Government. Not more than 25 officers and employees currently employed by the Government at any one time may hold waivers under this subparagraph.

(ii) A waiver granted under this subparagraph to any person shall apply only with respect to activities engaged in by that person after that person's Government employment is terminated and only to that person's employment at a Government-owned, contractor operated entity with which the person served as an officer or employee immediately before the person's Government employment began.

(B) Waivers under subparagraph (A) may be granted only to civilian officers and employees of the executive branch, other than officers and employees in the Executive Office of the President.

(C) A certification under subparagraph (A) shall take effect upon its publication in the Federal Register and shall identify—

- (i) the officer or employee covered by the waiver by name and by position, and
- (ii) the reasons for granting the waiver.

A copy of the certification shall also be provided to the Director of the Office of Government Ethics.

(D) The President may not delegate the authority provided by this paragraph.

(E)(i) Each person granted a waiver under this paragraph shall prepare reports, in accordance with clause (ii), stating whether the person has engaged in activities otherwise prohibited by this section for each six-month period described in clause (ii), and if so, what those activities were.

(ii) A report under clause (i) shall cover each six-month period beginning on the date of the termination of the person's Government employment (with respect to which the waiver under this paragraph was granted) and ending two years after that date. Such report shall be filed with the President and the Director of the Office of Government Ethics not later than 60 days after the end of the six-month period covered by the report. All reports filed with the Director under this subparagraph shall be made available for public inspection and copying.

(iii) If a person fails to file any report in accordance with clauses (i) and (ii), the President shall revoke the waiver and notify the person of the revocation. The revocation shall take effect upon the person's receipt of the notification and shall remain in effect until the report is filed.

(iv) Any person who is granted a waiver under this paragraph shall be ineligible for appointment in the civil service unless all reports required of such person by clauses (i) and (ii) have been filed.

(F) As used in this paragraph, the term "civil service" has the meaning given that term in section 2101 of title 5.

#### **(g) Contractual penalties**

(1) Regulations issued pursuant to subsection (o) of this section shall require that each contract awarded by a Federal agency contain a clause specified in such regulation that provides appropriate contractual penalties for conduct of any competing contractor prohibited by subsection (a) of this section and for any such conduct of any officer, employee, agent, representative, or consultant of such contractor.

(2) The following remedies are authorized to be included in, and shall be considered in the development of, such regulations:

(A) Denial of payment of all or any portion of the profit component of amounts otherwise payable to the contractor by the Federal agency under the contract and recovery of all or any portion of the profit component of amounts paid to the contractor by the Federal agency under the contract.

(B) Termination of the contract for default.

(C) Any other appropriate penalty.

#### **(h) Administrative actions**

(1) If an agency receives a disclosure of information pursuant to subsection (e) of this section

or otherwise receives or obtains information providing a reasonable basis to believe that an officer, employee, agent, representative, or consultant of a competing contractor has knowingly violated the requirements of this section—

(A) in the case of a procurement in which a contract has not been awarded, the agency shall determine whether to terminate the procurement or take other appropriate actions;

(B) in the case of a procurement with respect to which a contract has been awarded, the agency shall determine whether to void or rescind the contract, to terminate the contract for default, to impose sanctions upon the contractor, or to permit the contractor to continue to perform the contract, subject to review in accordance with, and to the extent provided in, the Contract Disputes Act of 1978 [41 U.S.C. 601 et seq.], or to take other appropriate actions; and

(C) if the agency determines that such a knowing violation has occurred, the agency, pursuant to procedures specified in the Federal Acquisition Regulation—

(i) may impose an immediate suspension, and

(ii) shall determine whether to initiate a debarment proceeding,

against the competing contractor or other person who committed such violation.

(2) Any procurement official of a Federal agency who engages in conduct prohibited by subsection (b) or (d) of this section shall be subject to removal or other appropriate adverse personnel action pursuant to the procedures specified in chapter 75 of title 5 or other applicable law or regulation.

(3) The actions taken under paragraph (1) or (2) may be suspended by the agency head upon the request of the Attorney General pending the disposition of any civil or criminal actions pursuant to subsections (i) and (j) of this section.

#### **(i) Civil penalties**

Any person who engages in conduct prohibited by subsection (a), (b), (d), or (f) of this section shall be subject to the imposition of a civil fine in a civil action brought by the United States in an appropriate district court of the United States. The amount of any such civil fine for such violation may not exceed—

(1) \$100,000 in the case of an individual; or

(2) \$1,000,000 in the case of a competing contractor (other than an individual).

#### **(j) Criminal penalties**

Whoever, during the conduct of a Federal agency procurement of property or services—

(1) being a competing contractor or an officer, employee, representative, agent, or consultant of a competing contractor, knowingly and willfully solicits or obtains, directly or indirectly, from any officer or employee of such agency any proprietary or source selection information (as such terms are defined in subsection (p) of this section and in regulations prescribed pursuant to subsection (o) of this section), or

(2) being an officer or employee of such agency, knowingly and willfully discloses or promises to disclose, directly or indirectly, to any

competing contractor or any officer, employee, representative, agent, or consultant of a competing contractor any proprietary or source selection information,

shall be imprisoned for not more than 5 years, or fined in accordance with title 18, or both.

**(k) Ethics advice**

(1) Regulations implementing this section shall include procedures for a procurement official or former procurement official of a Federal agency to request advice from the appropriate designated agency ethics official regarding whether such procurement official or former procurement official is or would be precluded by this section from engaging in a specified activity.

(2) A procurement official or former procurement official of an agency who requests advice from a designated agency ethics official pursuant to paragraph (1) shall provide the agency ethics official with all information reasonably available to the procurement official or former procurement official that is relevant to a determination regarding such request.

(3) Not later than 30 days after the date on which the appropriate designated agency ethics official receives a request for advice pursuant to paragraph (1) accompanied by the information required by paragraph (2), or as soon thereafter as practicable, the official shall issue a written opinion regarding whether the requesting procurement official or former procurement official is precluded by this section from engaging in the specified activity.

**(l) Training**

The head of each Federal agency shall establish a procurement ethics program for its procurement officials. The program shall, at a minimum—

(1) provide for the distribution of written explanations of the provisions of subsections (b), (c), and (e) of this section to such procurement officials; and

(2) require each such procurement official, as a condition of serving as a procurement official, to certify that he or she is familiar with the provisions of subsections (b), (c), and (e) of this section, and will not engage in any conduct prohibited by such subsection, and will report immediately to the contracting officer any information concerning a violation or possible violation of subsection (a), (b), (d), or (f) of this section, or applicable implementing regulations.

**(m) Remedies not exclusive**

Nothing in this subsection shall be construed to limit the applicability of the requirements, sanctions, contract penalties, and remedies established under any other law, but no agency shall be relieved of the obligation to carry out the requirements of this section because such agency has also applied such other requirements, sanctions, contract penalties, or remedies.

**(n) No authority to withhold information**

Nothing in this section shall be construed to authorize the withholding of any information from the Congress, any committee or sub-

committee thereof, a Federal agency, any board of contract appeals of a Federal agency, the Comptroller General, or an Inspector General of a Federal agency.

**(o) Implementing regulations and guidelines**

(1) Government-wide regulations and guidelines appropriate to carry out this section shall be included in the Federal Acquisition Regulation.

(2) Regulations implementing this section shall—

(A) define the term “thing of value” for the purposes of this section and shall include a single uniform Government-wide exclusion at a specific minimal dollar amount; and

(B) authorize the delegation of the functions assigned to designated agency ethics officials under this section.

(3) Notwithstanding sections 405 and 421 of this title, on and after June 1, 1990, the Director of the Office of Government Ethics shall have the responsibility for issuance, modification, or termination of Government-wide regulations implementing paragraphs (1) and (2) of subsection (a) of this section, paragraphs (1) and (2) of subsection (b) of this section, subsections (c), (f), and (k) of this section, and paragraph (2) of this subsection. The Director shall exercise such responsibility in coordination with the Federal Acquisition Regulatory Council.

**(p) Definitions**

As used in this section:

(1) The term “during the conduct of any Federal agency procurement of property or services” means the period beginning on the earliest specific date, as determined under implementing regulations, on which an authorized official orders or requests an action described in clauses (i)–(viii) of paragraph (3)(A), and concluding with the award, modification, or extension of a contract, and includes the evaluation of bids or proposals, selection of sources, and conduct of negotiations.

(2) The term “competing contractor”, with respect to any procurement (including any procurement using procedures other than competitive procedures) of property or services, means any entity that is, or is reasonably likely to become, a competitor for or recipient of a contract or subcontract under such procurement, and includes any other person acting on behalf of such an entity.

(3)(A) The term “procurement official” means, with respect to any procurement (including the modification or extension of a contract), any civilian or military official or employee of an agency who has participated personally and substantially in any of the following, as defined in implementing regulations:

(i) The drafting of a specification developed for that procurement.

(ii) The review and approval of a specification developed for that procurement.

(iii) The preparation or issuance of a procurement solicitation in that procurement.

(iv) The evaluation of bids or proposals for that procurement.

(v) The selection of sources for that procurement.



(vi) The conduct of negotiations in the procurement.

(vii) The review and approval of the award, modification, or extension of a contract in that procurement.

(viii) Such other specific procurement actions as may be specified in implementing regulations.

(B) For purposes of subparagraph (A), the term “employee of an agency” includes a contractor, subcontractor, consultant, expert, or adviser (other than a competing contractor) acting on behalf of, or providing advice to, the agency with respect to any phase of the agency procurement concerned.

(4) The term “contracting officer” means any official or employee of a Federal agency who has been authorized by the agency head or his or her designee to enter into, administer, or terminate contracts and make related determinations and findings.

(5) The term “Federal agency” has the meaning provided by section 472(b) of title 40.

(6) The term “proprietary information” means—

(A) information contained in a bid or proposal;

(B) cost or pricing data; or

(C) any other information submitted to the Government by a contractor and designated as proprietary, in accordance with law or regulation, by the contractor, the head of the agency, or the contracting officer.

(7) The term “source selection information” means information determined by the head of the agency or the contracting officer to be information—

(A) the disclosure of which to a competing contractor would jeopardize the integrity or successful completion of the procurement concerned; and

(B) which is required by statute, regulation, or order to be secured in a source selection file or other restricted facility to prevent such disclosure;

as further defined by regulations issued pursuant to subsection (m) of this section.

(8) The term “designated agency ethics official” has the meaning given such term by section 109(3) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(Pub. L. 93-400, §27, as added Pub. L. 100-679, §6(a), Nov. 17, 1988, 102 Stat. 4063; amended Pub. L. 101-189, div. A, title VIII, §814(a)-(d)(1), Nov. 29, 1989, 103 Stat. 1495-1498; Pub. L. 101-510, div. A, title XIV, §1484(l)(6), Nov. 5, 1990, 104 Stat. 1720; Pub. L. 102-25, title VII, §705(i), Apr. 6, 1991, 105 Stat. 121; Pub. L. 103-355, title VIII, §8301(e), Oct. 13, 1994, 108 Stat. 3397.)

#### REFERENCES IN TEXT

The Contract Disputes Act of 1978, referred to in subsec. (h)(1)(B), is Pub. L. 95-563, Nov. 1, 1978, 92 Stat. 2383, as amended, which is classified principally to chapter 9 (§601 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 601 of this title and Tables.

Section 109(3) of the Ethics in Government Act of 1978, referred to in subsec. (p)(8), is section 109(3) of

Pub. L. 95-521, which is set out in the Appendix to Title 5, Government Organization and Employees.

#### AMENDMENTS

1994—Subsec. (e)(1)(B). Pub. L. 103-355 inserted “, except in the case of a contract for the procurement of commercial items,” after “certifies in writing to such contracting officer” in introductory provisions.

1991—Subsec. (p)(8). Pub. L. 102-25 substituted “has the meaning given such term by section 109(3) of the Ethics in Government Act of 1978 (5 U.S.C. App.)” for “has the same meaning as the term ‘designated agency official’ in section 209(10) of the Ethics in Government Act of 1978 (92 Stat. 1850; 5 U.S.C. App.)”.

1990—Subsec. (f)(3)(D), (F). Pub. L. 101-510 redesignated subpar. (D), defining term “civil service”, as (F).

1989—Subsecs. (a)(1), (b)(1). Pub. L. 101-189, §814(a)(1)(A), inserted “, except as provided in subsection (c) of this section” before semicolon at end.

Subsec. (c). Pub. L. 101-189, §814(a)(1)(C), added subsec. (c). Former subsec. (c) redesignated (d).

Subsec. (d). Pub. L. 101-189, §814(a)(1)(B)(ii), redesignated subsec. (c) as (d). Former subsec. (d) redesignated (e).

Subsec. (e). Pub. L. 101-189, §814(a)(1)(B)(ii), redesignated subsec. (d) as (e). Former subsec. (e) redesignated (f).

Subsec. (e)(1)(A)(i), (B)(ii), (2)(A), (3)(A). Pub. L. 101-189, §814(c)(1)(A)-(D), substituted “(d), or (f)” for “(c), or (e)”.

Subsec. (e)(7)(B)(ii). Pub. L. 101-189, §814(c)(1)(E), substituted “subsection (o)” for “subsection (m)”.

Subsec. (f). Pub. L. 101-189, §814(a)(2)(B), substituted “Restrictions resulting from procurement activities of procurement officials” for “Restrictions on Government officials and employees” as heading, and “(1) No individual who, while serving as an officer or employee of the Government or member of the Armed Forces, was a procurement official with respect to a particular procurement may knowingly—” for “No Government official or employee, civilian, or military, who has participated personally and substantially in the conduct of any Federal agency procurement or who has personally reviewed and approved the award, modification, or extension of any contract for such procurement shall—”.

Pub. L. 101-189, §814(a)(2)(A), redesignated pars. (1) and (2) as subpars. (A) and (B), respectively.

Pub. L. 101-189, §814(a)(1)(B)(ii), redesignated subsec. (e) as (f). Former subsec. (f) redesignated (g).

Subsec. (f)(2). Pub. L. 101-189, §814(a)(2)(C), added par. (2).

Subsec. (f)(3). Pub. L. 101-189, §814(d)(1), added par. (3).

Subsec. (g). Pub. L. 101-189, §814(a)(1)(B)(ii), redesignated subsec. (f) as (g). Former subsec. (g) redesignated (h).

Subsec. (g)(1). Pub. L. 101-189, §814(c)(2), substituted “subsection (o)” for “subsection (m)”.

Subsec. (h). Pub. L. 101-189, §814(a)(1)(B)(ii), redesignated subsec. (g) as (h). Former subsec. (h) redesignated (i).

Subsec. (h)(1). Pub. L. 101-189, §814(c)(3)(A), substituted “subsection (e)” for “subsection (d)”.

Subsec. (h)(2). Pub. L. 101-189, §814(c)(3)(B), substituted “(b) or (d)” for “(b) or (c)”.

Subsec. (h)(3). Pub. L. 101-189, §814(c)(3)(C), substituted “(i) and (j)” for “(h) and (i)”.

Subsec. (i). Pub. L. 101-189, §814(c)(4), substituted “(d), or (f)” for “(c), or (e)”.

Pub. L. 101-189, §814(a)(1)(B)(ii), redesignated subsec. (h) as (i). Former subsec. (i) redesignated (j).

Subsec. (j). Pub. L. 101-189, §814(a)(1)(B)(ii), redesignated subsec. (i) as (j). Former subsec. (j) redesignated (l).

Subsec. (j)(1). Pub. L. 101-189, §814(c)(5), substituted “subsection (p)” for “subsection (n)” and “subsection (o)” for “subsection (m)”.

Subsec. (k). Pub. L. 101-189, §814(a)(3), added subsec. (k). Former subsec. (k) redesignated (m).

Subsec. (l). Pub. L. 101-189, §814(a)(1)(B)(i), redesignated subsec. (j) as (l). Former subsec. (l) redesignated (n).

Subsec. (I)(1). Pub. L. 101-189, §814(c)(6)(A), substituted “subsections (b), (c), and (e)” for “subsection (b)”.

Subsec. (I)(2). Pub. L. 101-189, §814(c)(6)(B), substituted “subsections (b), (c), and (e)” for “subsection (b)” and “(d), or (f)” for “(c), or (e)”.

Subsecs. (m), (n). Pub. L. 101-189, §814(a)(1)(B)(i), redesignated subsecs. (k) and (l) as (m) and (n), respectively. Former subsecs. (m) and (n) redesignated (o) and (p), respectively.

Subsec. (o). Pub. L. 101-189, §814(a)(4), amended subsec. (o) generally. Prior to amendment, subsec. (o) read as follows: “Government-wide regulations and guidelines deemed appropriate to carry out this section shall be issued in the Federal Acquisition Regulation within 180 days after November 17, 1988.”

Pub. L. 101-189, §814(a)(1)(B)(i), redesignated subsec. (m) as (o).

Subsec. (p). Pub. L. 101-189, §814(a)(1)(B)(i), redesignated subsec. (n) as (p).

Subsec. (p)(1). Pub. L. 101-189, §814(b)(1), substituted “on the earliest specific date, as determined under implementing regulations, on which an authorized official orders or requests an action described in clauses (i)–(viii) of paragraph (3)(A),” for “with the development, preparation, and issuance of a procurement solicitation.”

Subsec. (p)(3)(A). Pub. L. 101-189, §814(b)(2), added subpar. (A) and struck out former subpar. (A) which read as follows: “The term ‘procurement official’ means any civilian or military official or employee of an agency who has participated personally and substantially in the conduct of the agency procurement concerned, including all officials and employees who are responsible for reviewing or approving the procurement, as further defined by applicable implementing regulations.”

Subsec. (p)(8). Pub. L. 101-189, §814(b)(3), added par. (8).

#### EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as a note under section 251 of this title.

#### EFFECTIVE DATE

Section 6(b) of Pub. L. 100-679, as amended by Pub. L. 101-28, §1, May 15, 1989, 103 Stat. 57, provided that: “The amendment made by subsection (a) [enacting this section] shall take effect July 16, 1989.”

#### REGULATIONS

Section 814(e) of Pub. L. 101-189 provided that: “Not later than 90 days after the date of the enactment of this section [Nov. 29, 1989], regulations implementing the amendments made by this section to the provisions of section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. 423) shall be issued in accordance with sections 6 and 25 of such Act (41 U.S.C. 405, 421), after coordination with the Director of the Office of Government Ethics.”

#### CLARIFICATION OF FREQUENCY OF CERTIFICATION BY EMPLOYEES AND CONTRACTORS

Section 815(b) of Pub. L. 101-510 provided that: “Not later than 30 days after the date of the enactment of this Act [Nov. 5, 1990], the regulations implementing section 27(e)(1)(B) of the Office of Federal Procurement Policy Act (41 U.S.C. 423(e)(1)(B)) shall be revised to ensure that a contractor is required to obtain from each officer, employee, agent, representative, and consultant of the contractor only one certification (as described in clauses (i) and (ii) of that section) during the person’s employment or association with the contractor and that such certification shall be made at the earliest possible date after the person begins his or her employment or association with the contractor.”

#### SUSPENSION OF EFFECT OF SECTION

Section 815(a)(1) of Pub. L. 101-510 provided that subsection (f) of this section shall have no force or effect

during the period beginning on Dec. 1, 1990, and ending on May 31, 1991.

Pub. L. 101-194, title V, §507(1), Nov. 30, 1989, 103 Stat. 1759, provided that the provisions of this section shall have no force or effect during the period beginning Dec. 1, 1989, and ending one year after such date.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 428 of this title; title 43 section 1475a.

### § 424. Repealed. Pub. L. 103-355, title VIII, § 8303(b), Oct. 13, 1994, 108 Stat. 3398

Section, Pub. L. 93-400, §28, as added Pub. L. 100-679, §9, Nov. 17, 1988, 102 Stat. 4069, related to establishment and duties of Advocate for the Acquisition of Commercial Products.

#### EFFECTIVE DATE OF REPEAL

For effective date and applicability of repeal, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

### § 425. Nonstandard contract clauses

The Federal Acquisition Regulatory Council shall promulgate regulations to discourage the use of a nonstandard contract clause on a repetitive basis. The regulations shall include provisions that—

(1) clearly define what types of contract clauses are to be treated as nonstandard clauses; and

(2) require prior approval for the use of a nonstandard clause on a repetitive basis by an official at a level of responsibility above the contracting officer.

(Pub. L. 93-400, §29, as added Pub. L. 103-355, title I, §1093, Oct. 13, 1994, 108 Stat. 3273.)

#### EFFECTIVE DATE

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

### § 426. Federal acquisition computer network (FACNET) architecture

#### (a) In general

(1) The Administrator shall establish a program for the development and implementation of a Federal acquisition computer network architecture (hereinafter in this section referred to as “FACNET”) that will be Government-wide and provide interoperability among users. The Administrator shall assign a program manager for FACNET and shall provide for overall direction of policy and leadership in the development, coordination, installation, operation, and completion of implementation of FACNET by executive agencies.

(2) In carrying out paragraph (1), the Administrator shall consult with the heads of appropriate Federal agencies with applicable technical and functional expertise, including the Office of Information and Regulatory Affairs, the National Institute of Standards and Technology, the General Services Administration, and the Department of Defense.

(3) Government-wide FACNET capability (as defined in section 426a(b) of this title) shall be implemented not later than January 1, 2000.

**(b) Functions of FACNET**

The FACNET architecture shall provide for the following functions:

**(1) Government functions**

Allow executive agencies to do the following electronically:

(A) Provide widespread public notice of solicitations for contract opportunities issued by an executive agency.

(B) Receive responses to solicitations and associated requests for information through such system.

(C) Provide public notice of contract awards (including price) through such system.

(D) In cases in which it is practicable, receive questions regarding solicitations through such system.

(E) In cases in which it is practicable, issue orders to be made through such system.

(F) In cases in which it is practicable, make payments to contractors by bank card, electronic funds transfer, or other automated methods.

(G) Archive data relating to each procurement action made using such system.

**(2) Private sector user functions**

Allow private sector users to do the following electronically:

(A) Access notice of solicitations for contract opportunities issued by an executive agency.

(B) Access and review solicitations issued by an executive agency.

(C) Respond to solicitations issued by the executive agency.

(D) In cases in which it is practicable, receive orders from the executive agency.

(E) Access information on contract awards (including price) made by the executive agency.

(F) In cases in which it is practicable, receive payment by bank card, electronic funds transfer, or other automated means.

**(3) General functions**

(A) Allow the electronic interchange of procurement information between the private sector and the Federal Government and among Federal agencies.

(B) Employ nationally and internationally recognized data formats that serve to broaden and ease the electronic interchange of data.

(C) Allow convenient and universal user access through any point of entry.

**(c) Notice and solicitation regulations**

In connection with implementation of the architecture referred to in subsection (a) of this section, the Federal Acquisition Regulatory Council shall ensure that the Federal Acquisition Regulation contains appropriate notice and solicitation provisions applicable to acquisitions conducted through a FACNET capability. The provisions shall specify the required form and content of notices of acquisitions and the minimum periods for notifications of solicitations and for deadlines for the submission of offers under solicitations. Each minimum period speci-

fied for a notification of solicitation and each deadline for the submission of offers under a solicitation shall afford potential offerors a reasonable opportunity to respond.

**(d) "Architecture" defined**

For purposes of this section, the term "architecture" means the conceptual framework that—

(1) uses a combination of commercial hardware and commercial software to enable contractors to conduct business with the Federal Government by electronic means; and

(2) includes a description of the functions to be performed to achieve the mission of streamlining procurement through electronic commerce, the system elements and interfaces needed to perform the functions, and the designation of performance levels of those system elements.

(Pub. L. 93-400, §30, as added Pub. L. 103-355, title IX, §9001(a), Oct. 13, 1994, 108 Stat. 3399.)

**EFFECTIVE DATE**

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

**SECTION REFERRED TO IN OTHER SECTIONS**

This section is referred to in sections 252c, 426a of this title; title 10 section 2302c.

**§ 426a. Federal acquisition computer network implementation****(a) Certification of FACNET capability in procuring activities and agencies**

(1) When the senior procurement executive of an executive agency or, in the case of the Department of Defense, the Under Secretary of Defense for Acquisition and Technology, determines that a procuring activity of the executive agency has implemented an interim FACNET capability (as defined in subsection (c) of this section), the executive or the Under Secretary shall certify to the Administrator that such activity has implemented an interim FACNET capability.

(2) When the head of an executive agency, with the concurrence of the Administrator for Federal Procurement Policy, determines that the executive agency has implemented a full FACNET capability (as defined in subsection (d) of this section), the head of the executive agency shall certify to Congress that the executive agency has implemented a full FACNET capability.

(3) The head of each executive agency shall provide for implementation of both interim FACNET capability and full FACNET capability, with priority on providing convenient and universal user access as required by section 426(b)(3)(C) of this title, in that executive agency as soon as practicable after October 13, 1994.

**(b) Certification of Government-wide FACNET capability**

When the Administrator for Federal Procurement Policy determines that the Federal Government is making at least 75 percent of eligible contracts in amounts greater than the micro-

purchase threshold and not greater than the simplified acquisition threshold entered into by the Government during the preceding fiscal year through a system with full FACNET capability, the Administrator shall certify to Congress that the Government has implemented a Government-wide FACNET capability.

**(c) Implementation of interim FACNET capability**

A procuring activity shall be considered to have implemented an interim FACNET capability if—

(1) with respect to each procurement expected to be in an amount greater than the micro-purchase threshold and not greater than the simplified acquisition threshold, the procuring activity has implemented the FACNET functions described in paragraphs (1)(A), (1)(B), (2)(A), (2)(B), and (2)(C) of section 426(b) of this title; and

(2) for each such procurement (other than a procurement for which notice is not required under section 416(c) of this title or with respect to which the head of the procuring activity determines that it is not cost effective or practicable), the procuring activity issues notices of solicitations and receives responses to solicitations through a system having those functions.

**(d) Implementation of full FACNET capability**

An executive agency shall be considered to have implemented a full FACNET capability if (except in the case of procuring activities (or portions thereof) of the executive agency for which the head of the executive agency determines that implementation is not cost effective or practicable)—

(1) the executive agency has implemented all of the FACNET functions described in section 426(b) of this title; and

(2) more than 75 percent of the eligible contracts in amounts greater than the micro-purchase threshold and not greater than the simplified acquisition threshold entered into by the executive agency during the preceding fiscal year have been made through a system with those functions.

**(e) Eligible contracts**

For purposes of subsections (b) and (d) of this section, a contract is eligible if it is not in any class of contracts determined by the Federal Acquisition Regulatory Council (pursuant to section 9004 of the Federal Acquisition Streamlining Act of 1994) to be unsuitable for acquisition through a system with full FACNET capability.

(Pub. L. 93–400, §30A, as added Pub. L. 103–355, title IX, §9001(a), Oct. 13, 1994, 108 Stat. 3400.)

REFERENCES IN TEXT

Section 9004 of the Federal Acquisition Streamlining Act of 1994, referred to in subsec. (e), is section 9004 of Pub. L. 103–355, which is set out below.

EFFECTIVE DATE

For effective date and applicability of section, see section 10001 of Pub. L. 103–355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

GAO DETERMINATION OF ELIGIBLE AGENCY CONTRACTS

Section 9004 of Pub. L. 103–355 provided that:

“(a) REPORT ON CONTRACTS NOT SUITABLE FOR ACQUISITION THROUGH FULL FACNET CAPABILITY.—Not later than 3 years after the date of the enactment of this Act [Oct. 13, 1994], the Comptroller General shall submit to the Administrator for Federal Procurement Policy and the congressional committees referred to in subsection (d) a report on the classes of contracts in amounts greater than the micro-purchase threshold and not greater than the simplified acquisition threshold that are not suitable for acquisition through a system with full FACNET capability.

“(b) FAR COUNCIL DETERMINATIONS.—Not earlier than 3 years after the date of the enactment of this Act [Oct. 13, 1994], and after consideration of the report of the Comptroller General required by subsection (a), the Federal Acquisition Regulatory Council (established by section 25 of the Office of Federal Procurement Policy Act [41 U.S.C. 421]) may make a determination that a class or classes of contracts in amounts greater than the micro-purchase threshold and not greater than the simplified acquisition threshold are not suitable for acquisition through a system with full FACNET capability. Any such determination shall be submitted to the congressional committees referred to in subsection (d). Each determination under this subsection shall take effect 60 days after the date on which it is submitted to those committees.

“(c) APPLICABILITY OF DETERMINATIONS.—Each determination under subsection (b) shall apply for purposes of determining eligible contracts under section 30A(e) of the Office of Federal Procurement Policy Act, as added by section 9001 [41 U.S.C. 426a(e)].

“(d) COMMITTEES.—The report required by subsection (a), and any determination made under subsection (b), shall be submitted to the Committees on Governmental Affairs, on Armed Services, and on Small Business of the Senate and the Committees on Government Operations [now Government Reform and Oversight], on Armed Services [now National Security], and on Small Business of the House of Representatives.

“(e) DEFINITIONS.—In this section:

“(1) The term ‘simplified acquisition threshold’ has the meaning provided by section 4(11) of the Office of Federal Procurement Policy Act [41 U.S.C. 403(11)], as amended by section 4001.

“(2) The term ‘micro-purchase threshold’ has the meaning provided by section 32(g) of the Office of Federal Procurement Policy Act [41 U.S.C. 428(g)], as added by section 4301.

“(3) The term ‘full FACNET capability’ has the meaning described in section 30A(d) of the Office of Federal Procurement Policy Act [41 U.S.C. 426a(d)], as added by section 9001(a).”

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 416, 426, 427 of this title; title 15 section 637.

**§ 427. Simplified acquisition procedures**

**(a) Requirement**

In order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the Federal Acquisition Regulation shall provide for special simplified procedures for contracts for acquisition of property and services that are not greater than the simplified acquisition threshold.

**(b) Prohibition on dividing purchases**

A proposed purchase or contract for an amount above the simplified acquisition threshold may not be divided into several purchases or contracts for lesser amounts in order to use the simplified acquisition procedures required by subsection (a) of this section.

**(c) Promotion of competition required**

In using simplified acquisition procedures, the head of an executive agency shall promote competition to the maximum extent practicable.

**(d) Consideration of offers timely received**

The simplified acquisition procedures contained in the Federal Acquisition Regulation shall include a requirement that a contracting officer consider each responsive offer timely received from an eligible offeror.

**(e) Special rules for use of simplified acquisition procedures****(1) Effect of interim FACNET capability**

The simplified acquisition procedures provided in the Federal Acquisition Regulation pursuant to this section may not be used by a procuring activity of an agency for contracts in amounts greater than \$50,000 and not greater than the simplified acquisition threshold until a certification has been made pursuant to section 426a(a)(1) of this title that the procuring activity has implemented an interim FACNET capability.

**(2) Effect of full FACNET capability**

(A)(i) In the case of a procuring activity described in clause (ii), the simplified acquisition procedures provided in the Federal Acquisition Regulation pursuant to this section may be used by the activity for contracts in amounts greater than \$50,000 and not greater than the simplified acquisition threshold.

(ii) Clause (i) applies to any procuring activity—

(I) that has not certified, pursuant to section 426a(a)(1) of this title, that it has implemented interim FACNET capability; and

(II) that is in an agency that has excluded the procuring activity from the agency's full FACNET certification under section 426a(a)(2) of this title on the basis that implementation of full FACNET capability would not be cost effective or practicable in that activity.

(B) The simplified acquisition procedures provided in the Federal Acquisition Regulation pursuant to this section may not be used by an agency after December 31, 1999, for contracts in amounts greater than \$50,000 and not greater than the simplified acquisition threshold until a certification has been made pursuant to section 426a(a)(2) of this title that the agency has implemented a full FACNET capability.

**(f) Interim reporting rule**

Until October 1, 1999, procuring activities shall continue to report under section 417(d) of this title procurement awards with a dollar value of at least \$25,000, but less than \$100,000, in conformity with the procedures for the reporting of a contract award greater than \$25,000 that were in effect on October 1, 1992.

(Pub. L. 93-400, §31, as added Pub. L. 103-355, title IV, §4201(a), Oct. 13, 1994, 108 Stat. 3342.)

**EFFECTIVE DATE**

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective

Date of 1994 Amendment note under section 251 of this title.

**SECTION REFERRED TO IN OTHER SECTIONS**

This section is referred to in section 252b of this title; title 10 section 2302b.

**§ 428. Procedures applicable to purchases below micro-purchase threshold****(a) Requirements**

(1) The head of each executive agency shall ensure that procuring activities of that agency, in awarding a contract with a price exceeding the micro-purchase threshold, comply with the requirements of section 637(a) of title 15, section 2323 of title 10, and section 7102 of the Federal Acquisition Streamlining Act of 1994.

(2) The authority under part 13.106(a)(1) of the Federal Acquisition Regulation (48 C.F.R. 13.106(a)(1)), as in effect on November 18, 1993, to make purchases without securing competitive quotations does not apply to any purchases with a price exceeding the micro-purchase threshold.

**(b) Exclusion for micro-purchases**

A purchase by an executive agency with an anticipated value of the micro-purchase threshold or less is not subject to section 644(j) of title 15 and the Buy American Act (41 U.S.C. 10a-10c).

**(c) Applicability of certain provisions**

For purposes of section 423 of this title, an officer or employee of an executive agency, or a member of the Armed Forces of the United States, shall not be considered a procurement official if—

(1) the contracting authority of the officer, employee, or member does not exceed \$2,500; and

(2) the head of the contracting activity concerned (or a designee of the head of the contracting activity concerned) determines that the duties of the position of that officer, employee, or member are such that it is<sup>1</sup> unlikely that the officer, employee, or member will be required to conduct procurements in a total amount greater than \$20,000 in any 12-month period.

**(d) Purchases without competitive quotations**

A purchase not greater than \$2,500 may be made without obtaining competitive quotations if the contracting officer determines that the price for the purchase is reasonable.

**(e) Equitable distribution**

Purchases not greater than \$2,500 shall be distributed equitably among qualified suppliers.

**(f) Implementation through FAR**

This section shall be implemented through the Federal Acquisition Regulation.

**(g) Micro-purchase threshold defined**

For purposes of this section, the micro-purchase threshold is the amount of \$2,500.

(Pub. L. 93-400, §32, as added Pub. L. 103-355, title IV, §4301(a), Oct. 13, 1994, 108 Stat. 3346.)

**REFERENCES IN TEXT**

Section 7102 of the Federal Acquisition Streamlining Act of 1994, referred to in subsec. (a)(1), is section 7102

<sup>1</sup> So in original. Probably should be "it is".

of Pub. L. 103-355, which is set out as a note under section 644 of Title 15, Commerce and Trade.

The Buy American Act, referred to in subsec. (b), is title III of act Mar. 3, 1933, ch. 212, 47 Stat. 1520, as amended, which enacted sections 10a, 10b, 10b-1, and 10c of this title, and enacted provisions set out as notes under section 10c of this title. For complete classification of this Act to the Code, see Short Title note set out under section 10a of this title and Tables.

#### EFFECTIVE DATE

Section effective Oct. 13, 1994, and to be implemented in Federal Acquisition Regulation not later than 60 days after Oct. 13, 1994, see section 4301(c) of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 10a of this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 10a of this title.

### **§ 429. List of laws inapplicable to contracts not greater than simplified acquisition threshold in Federal Acquisition Regulation**

#### **(a) List of inapplicable provisions of law**

(1) The Federal Acquisition Regulation shall include a list of provisions of law that are inapplicable to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. A provision of law that is properly included on the list pursuant to paragraph (2) may not be construed as applicable to such contracts or subcontracts (as the case may be) by an executive agency. Nothing in this section shall be construed to render inapplicable to contracts and subcontracts in amounts not greater than the simplified acquisition threshold any provision of law that is not included on such list.

(2) A provision of law described in subsection (b) of this section that is enacted after October 13, 1994, shall be included on the list of inapplicable provisions of law required by paragraph (1), unless the Federal Acquisition Regulatory Council makes a written determination that it would not be in the best interest of the Federal Government to exempt contracts or subcontracts in amounts not greater than the simplified acquisition threshold from the applicability of the provision.

#### **(b) Covered law**

A provision of law referred to in subsection (a)(2) of this section is any provision of law that, as determined by the Federal Acquisition Regulatory Council, sets forth policies, procedures, requirements, or restrictions for the procurement of property or services by the Federal Government, except for a provision of law that—

(1) provides for criminal or civil penalties; or

(2) specifically refers to this section and provides that, notwithstanding this section, it shall be applicable to contracts or subcontracts in amounts not greater than the simplified acquisition threshold.

#### **(c) Petition**

In the event that a provision of law described in subsection (b) of this section is not included on the list of inapplicable provisions of law as required by subsection (a) of this section, and no written determination has been made by the Federal Acquisition Regulatory Council pursuant to subsection (a)(2) of this section, a person may petition the Administrator for Federal Pro-

curement Policy to take appropriate action. The Administrator shall revise the Federal Acquisition Regulation to include the provision on the list of inapplicable provisions of law unless the Federal Acquisition Regulatory Council makes a determination pursuant to subsection (a)(2) of this section within 60 days after the date on which the petition is received.

(Pub. L. 93-400, §33, as added Pub. L. 103-355, title IV, §4101, Oct. 13, 1994, 108 Stat. 3339.)

#### EFFECTIVE DATE

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 252a of this title; title 10 section 2302a.

### **§ 430. List of laws inapplicable to procurements of commercial items in Federal Acquisition Regulation**

#### **(a) List of inapplicable provisions of law**

(1) The Federal Acquisition Regulation shall include a list of provisions of law that are inapplicable to contracts for the procurement of commercial items. A provision of law that is properly included on the list pursuant to paragraph (2) may not be construed as applicable to purchases of commercial items by an executive agency. Nothing in this section shall be construed to render inapplicable to contracts for the procurement of commercial items any provision of law that is not included on such list.

(2) A provision of law described in subsection (c) of this section that is enacted after October 13, 1994, shall be included on the list of inapplicable provisions of law required by paragraph (1), unless the Federal Acquisition Regulatory Council makes a written determination that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of commercial items from the applicability of the provision.

#### **(b) Subcontracts**

(1) The Federal Acquisition Regulation shall include a list of provisions of law that are inapplicable to subcontracts under either a contract for the procurement of commercial items or a subcontract for the procurement of commercial items. A provision of law that is properly included on the list pursuant to paragraph (2) may not be construed as applicable to such subcontracts. Nothing in this section shall be construed to render inapplicable to subcontracts under a contract for the procurement of commercial items any provision of law that is not included on such list.

(2) A provision of law described in subsection (c) of this section shall be included on the list of inapplicable provisions of law required by paragraph (1) unless the Federal Acquisition Regulatory Council makes a written determination that it would not be in the best interest of the Federal Government to exempt subcontracts under a contract for the procurement of commercial items from the applicability of the provision.

(3) Nothing in this subsection shall be construed to authorize the waiver of the applicability of any provision of law with respect to any subcontract under a contract with a prime contractor reselling or distributing commercial items of another contractor without adding value.

(4) In this subsection, the term “subcontract” includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor.

**(c) Covered law**

A provision of law referred to in subsections (a)(2) and (b) of this section is any provision of law that, as determined by the Federal Acquisition Regulatory Council, sets forth policies, procedures, requirements, or restrictions for the procurement of property or services by the Federal Government, except for a provision of law that—

- (1) provides for criminal or civil penalties; or
- (2) specifically refers to this section and provides that, notwithstanding this section, it shall be applicable to contracts for the procurement of commercial items.

**(d) Petition**

In the event that a provision of law described in subsection (c) of this section is not included on the list of inapplicable provisions of law as required by subsection (a) or (b) of this section, and no written determination has been made by the Federal Acquisition Regulatory Council pursuant to subsection (a)(2) or (b)(2) of this section, a person may petition the Administrator for Federal Procurement Policy to take appropriate action. The Administrator shall revise the Federal Acquisition Regulation to include the provision on the list of inapplicable provisions of law unless the Federal Acquisition Regulatory Council makes a determination pursuant to subsection (a)(2) or (b)(2) of this section within 60 days after the date on which the petition is received.

(Pub. L. 93-400, §34, as added Pub. L. 103-355, title VIII, §8003(a), Oct. 13, 1994, 108 Stat. 3388.)

**EFFECTIVE DATE**

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

Section 8003(b) of Pub. L. 103-355 provided that: “No petition may be filed under section 34(d) of the Office of Federal Procurement Policy Act [41 U.S.C. 430(d)], as added by subsection (a), until after the date occurring 6 months after the date of the enactment of this Act [Oct. 13, 1994].”

**SECTION REFERRED TO IN OTHER SECTIONS**

This section is referred to in section 264 of this title; title 10 section 2375.

**CHAPTER 8—FEDERAL GRANTS AND COOPERATIVE AGREEMENTS**

**§§ 501 to 509. Repealed. Pub. L. 97-258, §5(b), Sept. 13, 1982, 96 Stat. 1083**

Section 501, Pub. L. 95-224, §2, Feb. 3, 1978, 92 Stat. 3, set out the Congressional findings and statement of purposes in enacting the Federal Grant and Cooperative Agreement Act of 1977 [this chapter]. Sections 1

and 10(b) of Pub. L. 95-224, setting out the short title provisions and savings provisions respectively of that Act, were set out as notes under this section, and were repealed by Pub. L. 97-258, §5(b), Sept. 13, 1982, 96 Stat. 1083. Section 10(d) of Pub. L. 95-224, as amended by Pub. L. 97-162, Apr. 1, 1982, 96 Stat. 23, setting out the excepted transactions provisions of that Act was set out as a note under this section, and was repealed by Pub. L. 97-258, §5(b), Sept. 13, 1982, 96 Stat. 1083. See sections 6301 and 6307(2) of Title 31, Money and Finance.

Section 502, Pub. L. 95-224, §3, Feb. 3, 1978, 92 Stat. 4, defined “State government”, “local government”, “other recipient”, “executive agency”, and “grant or cooperative agreement”. See section 6302 of Title 31.

Section 503, Pub. L. 95-224, §4, Feb. 3, 1978, 92 Stat. 4, provided for use of procurement contracts by executive agencies. See section 6303 of Title 31.

Section 504, Pub. L. 95-224, §5, Feb. 3, 1978, 92 Stat. 4, provided for use of grant agreements by executive agencies. See section 6304 of Title 31.

Section 505, Pub. L. 95-224, §6, Feb. 3, 1978, 92 Stat. 5, provided for use of cooperative agreements by executive agencies. See section 6305 of Title 31.

Section 506, Pub. L. 95-224, §7, Feb. 3, 1978, 92 Stat. 5, pertained to required and discretionary authorities. See section 6306 of Title 31.

Section 507, Pub. L. 95-224, §8, Feb. 3, 1978, 92 Stat. 5, directed Director of Office of Management and Budget to undertake a study to develop a better understanding of alternate means of implementing Federal assistance programs.

Section 508, Pub. L. 95-224, §9, Feb. 3, 1978, 92 Stat. 6, authorized Director of Office of Management and Budget to issue supplemental interpretive guidelines to promote consistent and efficient use of contracts, grant agreements, and cooperative agreements. See section 6307(1) of Title 31.

Section 509, Pub. L. 95-224, §10(c), Feb. 3, 1978, 92 Stat. 6, related to use of multiple relationships for different components of jointly funded projects. See section 6308 of Title 31.

**CHAPTER 9—CONTRACT DISPUTES**

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| Sec.<br>601.<br>602.<br><br>603.<br>604.<br>605. | Definitions.<br>Applicability of law.<br>(a) Executive agency contracts.<br>(b) Tennessee Valley Authority contracts.<br>(c) Foreign government or international organization contracts.<br>Maritime contracts.<br>Fraudulent claims.<br>Decision by contracting officer.<br>(a) Contractor claims.<br>(b) Review; performance of contract pending appeal.<br>(c) Amount of claim; certification; notification; time of issuance; presumption.<br>(d) Alternative means of dispute resolution.<br>(e) Termination of authority to engage in alternative means of dispute resolution; savings provision.<br>Contractor's right of appeal to board of contract appeals.<br>Agency boards of contracts appeals.<br>(a) Establishment; consultation; Tennessee Valley Authority.<br>(b) Appointment of members; chairman; compensation.<br>(c) Appeals; inter-agency arrangements.<br>(d) Jurisdiction.<br>(e) Decisions.<br>(f) Accelerated appeal disposition.<br>(g) Review.<br>(h) Procedural guidelines.<br>Small claims. |
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